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CLASSIFICATION OF REFUSALS.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 381.

LEWIS M. ALEXANDER, APPELLANT,

vs.

THE UNITED STATES.

No. 382.

GEORGE A. WHITING, APPELLANT,

vs.

THE UNITED STATES.

No. 383.

WILLIAM Z. STUART, APPELLANT,

vs.

THE UNITED STATES.

No. 384.

GENERAL PAPER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

No. 385.

E. T. HARMON AND GENERAL PAPER COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

No. 490.

BENJAMIN F. NELSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 491.

ANSELM C. BOSSARD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 492.

CLARENCE I. McNAIR, PLAINTIFF, IN ERROR,

vs.

THE UNITED STATES.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

Of the above-entitled causes, those numbered 381, 382, 383, 384 and 385 come to this court by appeals from orders of the United States Circuit Court for the Eastern District of Wisconsin, directing the witnesses involved to answer certain ques-

tions before the examiner; and numbers 490, 491 and 492 come here by writs of error from a judgment of the United States Circuit Court for the District of Minnesota, adjudging the plaintiffs in error, Nelson, Bossard and McNair to be severally in contempt of the said court, for refusing to comply with an order of the court directing them to answer certain questions before the examiner.

The cause in which the examinations, both in the Wisconsin and in the Minnesota Circuit, was being held is a proceeding by way of petition brought in the United States Circuit Court for the District of Minnesota, by the United States of America, against the General Paper Company and twenty-three other corporations defendent, under and pursuant to the provisions of the act of Congress of July 2, 1890, entitled "An act to Protect Trade and Commerce against unlawful Restraints and Monopolies." The defendants other than the General Paper Company are as follows:

Atlas Paper Company, Appleton, Wisconsin.

Kimberly and Clark Company, Neenah, Wisconsin;

Riverside Fibre and Paper Company, Appleton, Wisconsin;

Wausau Paper Mills Company, Brokaw, Wisconsin;

Centralia Pulp and Water-Power Company, Centralia, Wisconsin;

Combined Locks Paper Company, Combined Locks, Wisconsin;

Dells Paper and Pulp Company, Eau Claire, Wisconsin;

Grand Rapids Pulp and Paper Company, Grand Rapids, Wisconsin;

Menasha Paper Company, Menasha, Wisconsin;

The Nekoosa Paper Company, Nekoosa, Wisconsin;

The Falls Manufacturing Company, Oconto Falls, Wisconsin;

Flambeau Paper Company, Park Falls, Wisconsin;

The John Edwards Manufacturing Company, Port Edwards, Wisconsin;

The C. W. Howard Company, Menasha, Wisconsin;

Wolf River Paper and Fiber Company, Richmond, Wisconsin;

The Wisconsin River Paper and Pulp Company, Plover, Wisconsin;

Tomahawk Pulp and Paper Company, Park Falls, Wisconsin;

Consolidated Water Power and Paper Company, Grand Rapids, Wisconsin;

Rhinelander Paper Company, Rhinelander, Wisconsin;

The Itasca Paper Company, Grand Rapids, Minnesota;

Hennepin Paper Company, Little Falls, Minnesota;

Northwest Paper Company, Cloquet, Minnesota.

The Petoskey Fibre Paper Company, Petoskey, Michigan.

It is charged that these defendants, all of which are engaged in the manufacture of news-print, manila and fiber papers, have entered into a combination and conspiracy to restrain and eliminate competition among themselves, by and through the organization of a common selling agent, namely, the General Paper Company, the remaining party defendant.

The manufacturing corporations were, it is averred, prior to the year 1900, in active competition with one another, not only in the manufacture, but in the sale, of their respective products throughout

the middle, southern and western states. The gist of the Government's petition is that such competition was deliberately and effectually eliminated and suppressed by the orginization, in the spring of the year 1900, of the General Paper Company. The language of the petition is that these defendants

> "in violation of the provision of sections one and two, respectively, of an Act of Congress, approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies' (26 Stat. 209), entered into an agreement, combination and conspiracy with each other to restrain the trade and commerce among the several states, and to control, regulate and monopolize said trade and commerce, and thereby, in conjunction and alliance with defendants who subsequently joined in the aforesaid agreement, combination and conspiracy, as set forth in paragraph next succeeding, do now control, regulate and monopolize and restrain the trade and commerce, not only in the manufacture of news print, manila, fibre and other papers, but also the distribution, sale and shipment thereof among and throughout the states of the Union aforesaid and all states west of the

Mississippi river, by means and in the manner following, to-wit: on or about the 26th day of May, 1900, the defendants last above named caused to be organized, under the laws of the State of Wisconsin, a corporation styled the General Paper Company, with a capital stock of one hundred thousand dollars, divided into one thousand shares, which were distributed among and are now owned and held by the said last named defendants and the defendants that subsequently joined in the aforesaid combination and conspiracy, as hereinafter set forth, in proportions based, as your petitioner is informed, upon the average daily output of the mills of each defendant, which corporation, by its articles of incorporation, is authorized to become, as its principal business, the sales agent for any and all kinds of paper and paper products and any and all merchandise manufactured from paper or paper products by mills in the State of Wisconsin or elsewhere; and thereupon, in pursuance of a common plan and understanding, each and all of the aforesaid defendants entered into a contract and agreement with the said General Paper Company, making it the exclusive sell-

ing agent for their papers and paper products and conferring upon it absolute power to control and restrict the output of their mills, fix the price of all papers sold throughout the states aforesaid, and determine to whom and the terms and conditions upon which paper shall be sold, and into what states and places it shall be shipped, and what publishers and other customers each mill shall supply."

The answers filed by the defendants may be briefly summarized as follows: First, they admit the incorporation and location of the various companies as averred in the petition. Second, they admit that the manufacturing corporations defendant are and have been engaged in selling and shipping their product throughout the states and territories mentioned in the petition. Third, they admit that prior to the orginization of the General Paper Company these defendants were engaged in active competition with one another in the sale and shipment of their product, and allege that they have ever since continued so to compete. Fourth, it is admitted that the defendant General Paper Company was organized at the time given in the petition, with a capital stock of one hundred thousand dollars, and with authority to become, as its principal business, the sales agent

for any and all kinds of paper and paper products, and any and all merchandise manufactured from paper and paper products, by mills of the State of Wisconsin or elsewhere. It is further admitted that thereafter each of the manufacturing corporations defendant separately entered into a contract with the General Paper Company, making that company its exclusive selling agent to handle certain specified grades of paper. The answers deny, however, that the contracts between the General Paper Company and the manufacturing corporations ever conferred upon the former the power to control or restrict the output, or to fix the prices, conditions of sale or other manner of disposition of the paper sold under such contracts. On the contrary, it is answered that the General Paper Company is and has been under the duty merely of keeping the manufacturing defendants supplied with orders, at the best prices reasonably obtainable, and to submit all orders so obtained for the approval or rejection of the mill by which they were to be filled; and it is specifically denied that the defendants have ever entered into any agreement, combination or conspiracy to restrain trade and commerce, as charged in the petition. Fifth, it is admitted that the General Paper Company receives a fixed percentage upon all sales of paper, for

its services, and that the profits of the business of the General Paper Company, after paying expenses, are divided among the stockholders in proportion to their holdings.

As soon as the cause was at issue, a special examiner was appointed by the United States Circuit Court for the District of Minnesota, with authority to take testimony both within and without the District.

Hearings before the examiner were duly begun at Milwaukee, Wisconsin, on May 16th, 1905. The first witnesses called for examination by the Government were Lewis M. Alexander, secretary and treasurer of the General Paper Company, president of the John Edwards Manufacturing Company, secretary and treasurer of the defendant The Nekoosa Paper Company, and secretary of the Centralia Pulp and Water-Power Company; George A. Whiting, first vice-president of the General Paper Company, and president of the defendant The Wisconsin River Paper and Pulp Company; and William Z. Stuart, second vice-president and general sales manager of the General Paper Company. These witnesses appeared before the examiner in obedience to *subpoenas duces tecum* issued by order of the United States Circuit Court for the Eastern District of Wisconsin

(Trans. of Record, pages 1 to 35, 468. A second subpoena was served upon the witness Alexander, pursuant to the further order of the Circuit Court for the Eastern District of Wisconsin (Trans. of Record, pages 35 to 40, 500). These subpoenas directed the witnesses to produce before the examiner the books and papers hereinafter more particularly referred to.

On the examination of the witnesses up to the time of the application to the court, and chiefly upon the examination of the witness Alexander, the following among other facts were esablished.

First, the General Paper Company was organized at a meeting held in Milwaukee, Wisconsin, on May 26, 1900, at which persons representing the manufacturing corporations which originally went into the General Paper Company were present and subscribed for stock (Trans. of Record, pages 140 to 144; Petitioner's Exhibit 29, Transcript of Record pages 484 to 496).

Second, immediately after the organization of the General Paper Company and upon the date when that company opened its offices in Chicago for the transaction of business, that is to say, July 5, 1900, the corporations first represented in the General Paper Company, numbering fourteen in all, entered

into contracts with that company which are identical in form. Each contract was dated July 5, 1900, ran for the period of five years, and contained the following clause:

> "Said .....further covenants and agrees to and with the General Paper Company that for the period of five years from the date of this contract, said General Paper Company is constituted and shall be the sole sales agent of said..... Company, for the sale of any and all box lining, hanging, novel, print, fiber and manila paper manufactured by.....Company at said mills, and that during said period of five years from the date of this contract, any and all paper of the grades and classes hereinbefore described manufactured by said mills of .....Company shall be sold only through and by said General Paper Company, and that said .....Company will not sell or cause to be sold any of the grades or classes of paper hereinbefore described manufactured by it, by or through any other agent or agency, person or corporation whatsoever other than said General Paper Company, and that it will not during said period

of five years from the date of this contract itself sell or cause to be sold any paper manufactured by it in the aforesaid mills, of the classes or grades hereinbefore described, in any manner whatever except by and through said General Paper Company." (Trans. of Record, pages 497, 498.)

Third, from the organization of the General Paper Company, each constituent manufacturing corporation has been represented by one of its principal officers upon the board of directors of the General Paper Company, and the number of directors has, for this purpose, been from time to time increased as new manufacturing corporations have entered into contracts making the General Paper Company their exclusive selling agent. (Trans. of Record, pages 272, 273.) There was an entire rearrangement and redistribution of the stock of the General Paper Company in December, 1902, at which time several new companies became members of the General Paper Company. The following table, compiled from the evidence, shows the time when each corporation joined the General Paper Company, the membership of the board of directors of that company, and the distribution of stock:

Fourth, the General Paper Company has an executive committee, comprised of substantially the same persons that constitute the board of directors.

Fifth, the General Paper Company has books and records containing the minutes of the meetings of the stockholders, directors and the executive committee.

Sixth, the treasurer and sales agent have, from time to time since the organization of the General Paper Company, presented reports to the stockholders, directors and to the executive committee.

Seventh, there were various preliminary meetings held during the fall of 1899 and the spring of 1900, by the parties who ultimately organized the General Paper Company, at which meetings the organization of such company was discussed. (See particularly testimony of witness Whiting.) As expressed by the first vice-president of the General Paper Company, that company was organized "through a necessity to head off the abuses of the trade." Among these abuses the witness named the low price of paper, cash discounts, the insistence of publishers upon allowances for waste paper which had to be returned to the mill, and the demand of the consumer for the right to purchase on a production basis, that is, to have the weight of paper regulated so that it

CONSTITUENT COMPANIES	Date of contract with Gen. Paper Co.	SUBSCRIPTIONS MAY 26, 1900
Kimberly & Clark Co	July 5, 1900	J. A. Kimberly J. C. Kimberly
Atlas Paper Co	July 5, 1900	W. Z. Stuart F. C. Shattuck
Combined Locks P. Co	July 5, 1900	J. S. Van Nortwick D. E. Reese
The C. W. Howard Co	July 5, 1900	C. W. Howard
John Edwards Mfg. Co	July 5, 1900	L. M. Alexander
Nekoosa Paper Co	July 5, 1900	T. E. Nash
Centralia P. & W.-P. Co	July 5, 1900	F. Garrison
Grand Rapids P. & P. Co	July 5, 1900	E. T. Harmon John Daly
Wis. River P. & P. Co	July 5, 1900	Geo. A. Whiting C. A. Babcock
Tomahawk P. & P. Co	July 5, 1900	A. M. Pride
Dells Paper & Pulp Co	July 5, 1900	D. R. Davis
Hennepin Paper Co	July 5, 1900	B. F. Nelson
Wausau Paper Mills Co	July 5, 1900	W. L. Edmonds
Falls Mfg. Co	July 5, 1900	E. A. Edmonds N. H. Brokaw
Itasca Paper Co	February 5, 1902	
Northwest Paper Co	April 8, 1902	
Petoskey F. P. Co	July 14, 1902	
Riverside F. & P. Co	December 1, 1902	
Wolf River P. & F. Co	December 1, 1902	
Menasha Paper Co	December 1, 1902	
Flambeau Paper Co	December 1, 1902	
Rhinelander Paper Co	August 31, 1904	
Consolidated W.-P. & P. Co	July 31, 1904	
Treasury Stock		
Sales Mgr. and Vice Pres		
TOTAL		

ONS 00	Shares	SUBSCRIPTIONS JUNE 18, 1900 (*)	Shares	Direct-ors	STOCKHOLDERS DECEMBER 11, 1900	Shares	Direct-ors	STOCKHOLDERS DECEMBER 10, 1901	Shares	Direct-ors	STOCKHOLDERS DECEMBER 9, 1902	Shares	Direct-ors	
.....	125	J. A. Kimberly		D	J. A. Kimberly		D	J. A. Kimberly		D	J. A. Kimberly	125	D	J. A.
.....	5	J. C. Kimberly	260		J. C. Kimberly	260		J. C. Kimberly	260		J. C. Kimberly	8¾	D	J. C.
.....	50	W. Z. Stuart		D	W. Z. Stuart		D	W. Z. Stuart		D	H. Babcock	5		H. B
.....	5	F. C. Shattuck		D	F. C. Shattuck		D	F. C. Shattuck		D				F. J.
ick..	65	J. S. Van Nortwick	90	D	J. S. VanNortwick	90	D	J. S. VanNortwick	90	D	J. S. VanNortwick	86¼	D	J. S.
.....	50				D. E. Reese									
.....	50	C. W. Howard	34	D	C. W. Howard	34	D	C. W. Howard	34	D	C. W. Howard	37½	D	C. W
.....	80	L. M. Alexander	72	D	L. M. Alexander	72	D	L. M. Alexander	72	D	L. M. Alexander	80	D	L. M
.....	130	T. E. Nash	145	D	T. E. Nash	145	D	T. E. Nash	145	D	T. E. Nash	97½	D	T. E.
.....	45	F. Garrison	46	D	F. Garrison	46	D	F. Garrison	46	D	F. Garrison	33¾	D	F. G
.....	22	E. T. Harmon	54	D	E. T. Harmon	54	D	E. T. Harmon	54	D	E. T. Harmon	42¾	D	E. T.
.....	35	John Daly		D	John Daly		D	John Daly		D				
.....	50	Geo. A. Whiting	72	D	Geo. A. Whiting	72	D	Geo. A. Whiting	72	D	Geo. A. Whiting	35	D	Geo.
.. ....	30	C. A. Babcock		D	C. A. Babcock		D	C. A. Babcock		D	C. A. Babcock	25		C. A.
.....	20	A. M. Pride	18	D	A. M. Pride	18	D	A. M. Pride	18	D	A. M. Pride	15	D	A. M
.....	100	C. B. Pride												
.....	30	D. R. Davis	81	D	D. R. Davis	81	D	D. R. Davis	81	D	D. R. Davis	75	D	W. L
.....	60	B. F. Nelson	29					B. F. Nelson	...	D	B. F Nelson	22½	D	B. F.
.....	18	W. L. Edmonds	54	D	W. L. Edmonds	54	D	W. L. Edmonds	54	D	W. L. Edmonds	45	D	W. L
.....	30	E. A. Edmonds	45	D	E. A. Edmonds	45	D	E. A. Edmonds	45	D	E. A. Edmonds	36	D	E. A.
		N. H. Brokaw		D	N. H. Brokaw		D	N. H. Brokaw		D				
											A. C. Bossard	30	D	A. C.
											C. I. McNair	60	D	C. I.
											F. M. Aiken	21	D	F. M
											W. B. Murphy	28	D	W. B
											F. D. Naber	28	D	F. B.
											M. H. Ballou	54	D	M. H
											E. P. Sherry	28	D	E. P.
														E. A.
					Treasury	28		Treasury	28					
					H. M. French	1	D	H. M. French	1		W. Z. Stuart	1	D	W. Z
	1000		1000	17		1000	17		1000	17		1000	22	

* Stock was also paid for on this basis.

Shares	Directors	STOCKHOLDERS DECEMBER 10, 1901	Shares	Directors	STOCKHOLDERS DECEMBER 9, 1902	Shares	Directors	STOCKHOLDERS DECEMBER 8, 1903	Shares	Directors	STOCKHOLDERS DECEMBER 13, 1904	Shares	Directors
	D	J. A. Kimberly		D	J. A. Kimberly	125	D	J. A. Kimberly	125	D	J. A. Kimberly	125	D
200		J. C. Kimberly	200		J. C. Kimberly	83¾	D	J. C. Kimberly	41¾	D	J. C. Kimberly	41¾	
	D	W. Z. Stuart		D	H. Babcock	5		H. Babcock	5		H. Babcock	5	
	D	F. C. Shattuck		D				F. J. Sensenbrenner	4	D	F. J. Sensenbrenner	4	D
90	D	J. S. VanNortwick	90	D	J. S. VanNortwick	86¼	D	J. S. VanNortwick	86¼	D	J. S. VanNortwick	86¼	D
34	D	C. W. Howard	34	D	C. W. Howard	37½	D	C. W. Howard	37½	D	C. W. Howard	37½	D
72	D	L. M. Alexander	72	D	L. M. Alexander	60	D	L. M. Alexander	60	D	L. M. Alexander	60	D
145	D	T. E. Nash	145	D	T. E. Nash	97½	D	T. E. Nash	97½	D	T. E. Nash	97½	D
46	D	F. Garrison	46	D	F. Garrison	33¾	D	F. Garrison	33¾	D	F. Garrison	33¾	D
54	D	E. T. Harmon	54	D	E. T. Harmon	42¾	D	E. T. Harmon	42¾	D	E. T. Harmon	42¾	D
	D	John Daly		D									
72	D	Geo. A. Whiting	72	D	Geo. A. Whiting	35	D	Geo. A. Whiting	35	D	Geo. A. Whiting	35	D
	D	C. A. Babcock		D	C. A. Babcock	25		C. A. Babcock	25	D	C. A. Babcock	25	D
18	D	A. M. Pride	18	D	A. M. Pride	15	D	A. M. Pride	15	D	A. M. Pride	15	D
81	D	D. R. Davis	81	D	D. R. Davis	75	D	W. L. Davis	75	D	W. L. Davis	75	D
		B. F. Nelson	...	D	B. F Nelson	22½	D	B. F. Nelson	22½	D	B. F. Nelson	22½	D
54	D	W. L. Edmonds	54	D	W. L. Edmonds	45	D	W. L. Edmonds	45	D	W. L. Edmonds	45	D
45	D	E. A. Edmonds	45	D	E. A. Edmonds	36	D	E. A. Edmonds	36	D	E. A. Edmonds	34	D
		N. H. Brokaw									J. H. Dellbridge	1	D
					A. C. Bossard	30	D	A. C. Bossard	30	D	A. C. Bossard	30	D
					C. I. McNair	60	D	C. I. McNair	60	D	C. I. McNair	60	D
					F. M. Aiken	21	D	F. M. Aiken	21	D	L. H. Cheeseman	21	
					W. B. Murphy	28	D	W. B. Murphy	28	D	W. B. Murphy	28	D
					F. D. Naber	28	D	F. B. Naber	28	D	F. D. Naber	28	D
					M. H. Ballou	54	D	M. H. Ballou	54	D	M. H. Ballou	53	D
											S. E. Smith	1	D
					E. P. Sherry	28	D	E. P. Sherry	27	D	E. P. Sherry	27	D
								E. A. D. Reynolds	1	D	E. A. D. Reynolds	1	
											Geo. W. Mead	1	D
28		Treasury	28										
1	D	H. M. French	1		W. Z. Stuart	1	D	W. Z. Stuart	1	D	W. Z. Stuart	1	D
1000	17		1000	17		1000	22		1000	25		1000	25

would produce so many newspapers to the pound. These abuses, it was testified, had been corrected since the organization of the General Paper Company. (Transcript of Record, pages 339 to 341.)

In addition to the above facts divulged by the witness, the following facts were admitted upon the record: (Transcript of Record, page 301.)

> "For the purposes of this action only, the several corporations represented in this action by Winkler, Flanders, Smith, Bottum & Fawsett, Defrees, Brace & Ritter, and John Barnes, admit that all subscriptions of stock to the General Paper Company and made by the individual subscribers therefor from time to time, were made for and on behalf of some paper manufacturing corporation with which each of such individuals was connected, and that the stock issued to such individuals was, with the exceptions hereinafer stated, paid for at or about the time when such subscriptions were made and the stock taken by the several persons for said mill corporations respectively, with the moneys of said defendant corporations with which such individuals were respectively connected, and that such corporations thereby became and have continuously

remained the beneficial owners respectively of the stock so issued to such individuals, and dividends declared upon the stock were the property of such corporations respectively; that said stock was from time to time allotted to such corporations as should make contracts with the General Paper Company in the form of those contracts actually executed which have been received in evidence in this case creating it their exclusive selling agent of the kinds and grades of paper mentioned in such contracts, and upon the basis of the estimated relative productions of such kinds and grades of paper made by the mill corporations represented, and that all subscriptions by, and allotments of stock to such mill corporations were made approximately on said basis; that the exceptions above referred to are as follows: the stock of E. A. Edmonds of the Rhinelander Paper Company, the stock held by John S. Van Nortwick and William N. Van Nortwick, the stock of the Combined Locks Paper Company, the stock of George W. Mead of the Consolidated Water Power and Paper Company, and the stock of W. Z. Stuart. The said defendants will produce, as a part of this

admission, and consent that the same be filed or incorporated in the record, a correct list of the individuals to whom stock was issued with the names of the corporations respectively represented by said individuals, the dates of the issuance of the stock to said individuals for their respective corporations, together with copies of all outstanding certificates of stock, and all endorsements thereon, and assignments thereof, and a statement showing how and by whom the said certificates are now held."

The statement last referred to was furnished and appears as Petitioner's Exhibit 150 attached to the record in the case of Harmon v. United States, page 160.

After the examination of the witnesses Alexander, Whiting and Stuart had been suspended for the purpose of making an application to the court to compel them to answer questions, and before such application was made, the Government produced and examined certain other witnesses.

The witness Adam Brown, formerly vice-president of the defendant The C. W. Howard Company, testified to the existence of a pool among the corporations defendant manufacturing a grade of

paper known as "butcher's fibre." It appeared from the testimony of this witness that this grade of paper, being less profitable to manufacture than other grades handled by and through the General Paper Company, it was agreed that the mill or mills engaged in its manufacture should be compensated therefor by the other fiber mills in the General Paper Company, the basis of such compensation being fixed by statements issued from time to time by and through the General Paper Company. (Trans. of Record, page 365 *et seq.*)

The witness, John C. Brocklebank, western manager of the Manufacturers Paper Company, a paper selling agency with offices at Chicago, Illinois, testified that shortly prior to the organization of the General Paper Company, the parties who finally effected its organization held a meeting in Chicago with him and another representative of the Manufacturers Paper Company, at which they endeavored to reach an agreement whereby the Manufacturers Paper Company should become the exclusive selling agent for the manufacturing corporations which afterwards contracted with the General Paper Company. The witness testified that the object of the negotiation, as expressed at the meeting, was to eliminate competition among the

various mills concerned and thereby remedy what they regarded as abuses in the trade, namely, low prices for their product and certain conditions favorable to consumers. The parties to this conference failed to agree because the representatives of the Manufacturers Paper Company refused to turn over to the mill owners a majority of the stock of that company. (Trans. of Record, pages 396-462.)

In the case of the witness Harmon, the situation differs only in minor particulars from that in the case of the other witnesses called in the Wisconsin Circuit. Between the suspension of the examination of the witnesses Alexander, Whiting and Stuart and the calling of the witness Harmon, there intervened not only the testimony of the witnesses Brown and Brocklebank, already mentioned, but the testimony of several newspaper publishers, tending to establish two principal facts: (1st) that, after the organization of the General Paper Company, all competition among the other defendants in the sale of news print paper ceased; (2d) that, in making sales of news print paper, the General Paper Company, through its officers and agents, fixed the price and determined all of the conditions of sale without reference to the mills which manufactured the

paper. The witness Harmon was a director of the General Paper Company, and was the president and manager of the defendant Grand Rapids Pulp and Paper Company, and a stockholder of the defendant Centralia Pulp and Water Power Company.

Subsequently and on the 15th day of July, 1905, a hearing was had before the examiner at St. Paul, Minnesota, at which the plaintiffs in error, Benjamin F. Nelson, president of the Hennepin Paper Company and director of the General Paper Company, Anselm C. Bossard, treasurer and manager of the defendant Itasca Paper Company and director of the General Paper Company, and Clarence I. McNair, general manager of the defendant Northwest Paper Company and director of the General Paper Company, were called as witnesses. They appeared in obedience to *subpoenas duces tecum* issued by the United States Circuit Court for the District of Minnesota, directing them to produce before the examiner the books and papers hereinafter more particularly referred to. (Trans. of Record in Minnesota cases, pages 33 to 38.

Coming now to the subject of the refusals on the part of the witnesses to answer questions, or permit the use of books and papers called for in the subpoenas, there are two features of the situation

to which we wish to call attention at the outset: First, the books and papers in every instance were either actually in court before the examiner, or it was agreed by the witness and his counsel that they might be considered as actually in court. Second, the objections made before the examiner to the questions and requests which are not answered or complied with, were concerned entirely with the admissibility of the evidence called for, and did not suggest any question of personal privilege. The plea of privilege was subsequently raised in the answers filed to the orders to show cause. Before the examiner, counsel for the defendant simply took the witness absolutely under his control, assumed to pass finally upon the competency, materiality and relevancy of the evidence sought to be adduced, and peremptorily instructed the witness to decline to answer or comply. We shall hereafter enter upon a detailed examination of the refusals. It is only necessary at this point to state that as soon as it became apparent that every avenue of progress in the examination of the witness was effectually blocked by the instructions of his counsel, the examination was in each instance suspended at the request of counsel for the Government, in order that application might be made to the court for orders directing the witnesses to answer.

The order to show cause in the first proceedings in the Wisconsin Circuit issued upon the petition of the Government (Trans. of Record, pages 41 to 54) was returnable June 6, 1905. On that date the witnesses Alexander, Whiting and Stuart appeared in person and by their counsel, and, after argument occupying that day, the hearing was adjourned at the request of counsel for the various respondents, to be resumed on June 14, 1905. At the hearing on June 14, 1905, answers to the order to show cause were filed (Trans. of Record, pages 55 to 61), briefly setting up matter designed to raise any question of privilege which might be pleaded by the General Paper Company or by the witnesses respectively. After the decision of the court directing the witnesses to answer had been filed, and at the time application was made to appeal, leave was asked and granted to file amended answers setting up the questions of privilege more fully. (Trans. of Record, pages 64 to 84.) Subsequently when the appeal was allowed in the case of the witness Harmon, leave was again asked to amend the original answers, and a third set of answers was filed for the witnesses Alexander and Whiting. (Trans. of Record, pages 85 to 98.) As these last answers assumed to set out finally and completely the defenses imposed by the respondents, we may consider them alone and ignore the others.

After the hearing above mentioned, the United State Circuit Court for the District of Wisconsin made an order directing the witnesses Alexander, Whiting and Stuart to answer and to produce the evidence called for; and thereupon appeals were allowed and taken from that order by each of the said witnesses and by the General Paper Company.

Later, a similar order to show cause was issued by the same court, as to the witness Harmon. The answer interposed by the witness is a counterpart of those filed by the other witnesses; and an order directing him to answer and to produce evidence was also made. From this last order an appeal was allowed and taken by the witness Harmon and the General Paper Company.

Similar proceedings were had in the Minnesota Circuit, upon refusal of the witnesses Nelson, Bossard and McNair to answer before the examiner. An order was issued directing the witnesses to appear and show cause why they should not be required to answer and to produce the books and papers called for. After hearing, the court ordered the witnesses to reappear before the examiner and answer the questions and comply with the requests to produce evidence which had been made. From this latter order the court refused to allow an appeal. (Trans.

of Record in Minn. cases, page 54.) Whereupon, the witnesses still persisting in their refusals (Trans. of Record in Minn. cases, page 56), and that fact being reported to the court, contempt proceedings were instituted against them, resulting in the adjudication of contempt, in accordance with which they were severally fined in the sum of $100, and sentenced to jail until such fine should be paid and until they should each comply with the order of the court.

The answers interposed by the plaintiffs in error, Nelson, Bossard and McNair, in the contempt proceedings against them, were exactly the same as their returns to the order to show cause, and set up the same defences as were urged by the appellants Alexander, Whiting, Stuart and Harmon in their returns to the orders to show cause in the Wisconsin Circuit. These defences we are now to consider.

The witnesses first attempted to plead a privilege, in behalf of the corporations which they represented, not to have the books and papers produced and the questions under consideration answered. It was alleged that the books and papers were in the possession of the witnesses only as officers of the several companies represented by them, and that the information sought to be adduced by

the questions came to their knowledge only as such officers. It was then alleged that the companies objected to the production of the books and papers, and to the answering of the questions, upon four grounds, namely:

First, that the matters called for had not been shown to be material, relevant or competent evidence in the cause;

Second, that one of the purposes sought to be furthered by the production of the books and papers, and the securing of the information called for, was to compel the General Paper Company and the other defendants to furnish evidence tending to establish that they had been guilty of violations of the Act of July 2, 1890, and that, to compel them to furnish this evidence through their officers would be contrary to the provisions of the Fourth and Fifth Amendments to the Constiution of the United States;

Third, that the production of the evidence called for would tend to establish violations of the laws of the State of Wisconsin (in the cases of the witnesses called in that state), and of the State of Minnesota (in the cases of the witnesses called in that state), on the part of the General Paper Company and the other defendants, and that, to compel them, through their officers, to furnish such evi-

dence, would also be contrary to the Fourth and Fifth Amendments to the Constitution of the United States;

Fourth, that the decree sought by the Government against the defendants would render inoperative and of no value the agency-contracts between the General Paper Company and the other defendants, and that, therefore, to compel the corporations to produce evidence tending to that end would be to compel the defendants to give testimony which might subject them to forfeitures, or something in the nature of a forfeiture or penalty, contrary to the rules of common-law and equity jurisprudence.

Finally, the respondents pleaded their own personal privilege, alleging as a basis therefor three grounds, namely:

First, that to compel the production of the evidence called for would be to compel them to furnish evidence tending to establish that they had been guilty of violations of the federal laws, contrary to the Fourth and Fifth Amendments to the Constitution of the United States;

Second, that to compel them to produce the evidence called for would tend to establish violations by them of the laws of the State of Wisconsin (in the cases of the witnesses called in that state), and

of the state of Minnesota (in the cases of the witnesses called in that state), thereby compelling them to give evidence against themselves, contrary to the Fourth and Fifth Amendments to the Constitution of the United States;

Third, that the production of the evidence called for would tend to establish the allegations of the original petition in the cause, which, if established, would result in subjecting the respondents, as stockholders of the General Paper Company and other defendant companies, to loss or detriment in the nature of a penalty or forfeiture, and would, therefore, be compelling them to give testimony against themselves, contrary to the Fourth and Fifth Amendments to the Constitution of the United States and to the rules of common-law and equity jurisprudence.

In dealing with the questions of law which arise upon this record, we shall consider, first, the questions of evidence raised by the objections that the evidence called for is incompetent and immaterial to the issues. We shall then consider the questions of privilege finally set up by the respondents in their answers to the orders to show cause.

I.

IN THE ABSENCE OF ANY PERSONAL PRIVILEGE TO THE CONTRARY, THE EVIDENCE SOUGHT FOR SHOULD BE PRODUCED AND GIVEN BEFORE THE EXAMINER.

(A) Whether finally admissible or not, the evidence should be given and received before the examiner, inasmuch as all questions of materiality, relevancy and competency must be left primarily for determination upon final hearing by the United States Circuit Court for the District of Minnesota where the cause is pending, and ultimately for decision by this court when the suit shall be considered here on appeal.

Let us first consider what questions are brought to this court by an appeal from the order and judgment of the Circuit Court for the Eastern District of Wisconsin, and by the writ of error from the final judgment of conviction for contempt in the Circuit Court for the District of Minnesota.

These cases are brought to this court solely because they involve a right pleaded by the witnesses under the Constitution of the United States. Court

of Appeal Act, being Act of March 3, 1891, U. S. Comp. Stat. 1901, § 5, p. 549; Act to expedite cases brought under the Interstate Commerce Act and Sherman Act, being Act of February 11, 1903, § 2.

Had the witnesses, instead of appealing from the order and taking a writ of error from the judgment of contempt, sued out a writ of habeas corpus, this court would have had jurisdiction on appeal from a judgment discharging the writ. *Ekiu v. United States,* 142 U.S.651; *Horner v. United States,* 146 U. S. 120. And it is only the question of the validity of the judgment overruling their plea under the constitution that can be considered. *In Re Tyler,* 149 U. S. 164; *In Re Lennon,* 166 U. S. 552. A writ of error from the judgment of contempt will bring up no other question. *Bessette v. Conkey,* 194 U. S. 324.

These witnesses set up a privilege under the Fourth and Fifth Amendments to the Constitution, and, this question being finally disposed of by the decision against them, can be reviewed in this court, and no other question. This court cannot pass upon the relevancy or materiality of the evidence.

These witnesses are not interested in the question of whether the testimony is material or not, but only in the question of whether their personal privi-

leges have been violated. The court will not review a mere interlocutory order or ruling upon the relevancy of the testimony, nor consider the sufficiency of the description of the books and documents sought to be produced in a *subpoena duces tecum*, nor the question of whether the complaint sufficiently states a cause of action. All these questions will be disposed of by the final decree. But, as these defendants have brought to this court the entire record, and have raised and argued questions of the relevancy and materiality of the evidence, we deem it advisable to submit our views thereupon.

In the absence of any personal privilege to the contrary, it was the duty, both of the Circuit Court for the Eastern District of Wisconsin and of the Circuit Court for the District of Minnesota, to direct the witnesses within their respective jurisdictions to answer, even if they should be of the opinion that the evidence in question would be finally declared inadmissible. The procedure of taking testimony before a master or examiner has been firmly established by the rules of this court. Under that practice it is obviously impossible to have questions of the admissibility of the evidence determined as they arise. The master or examiner cannot determine them, for his authority never goes to that

length. His duty is to take and report all of the testimony offered, with the objections made by the parties. The only forum which can pass upon these objections is that in which the cause is pending and which must finally decide the issues between the parties. Not only this, but even where the court of first instance regards the testimony as inadmissible the settled rule of the federal courts is that it must, nevertheless, be included in the record. This follows inevitably from the fact that equity causes go to the court of last resort by appeal and not by writ of error. Although the appellate tribunal is the judge of the facts as well as the law, no new evidence can there be received, and it is not the custom or practice, since the promulgation of the amended equity rules, to send equity causes back for the taking of additional testimony. The rule was definitely laid down in *Blease v. Garlington,* 92 U. S. 1. That was a suit for the foreclosure of a mortgage, and upon the hearing in the court below the defendant presented himself as a witness to be examined orally in open court and proposed to testify to certain facts. The court refused to receive his testimony, and it was not begun. After a decree in favor of the complainant the case was brought to the Supreme Court by appeal. The court said:

"While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing, and made part of the record or it will be entirely disregarded here on an appeal. So, too, if the testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see, that it conforms in other respects to the established practice of the court."

The rule of *Blease v. Garlington* has never been changed. Here was a case where testimony offered in open court, where a suit was pending, was excluded from the record. The Supreme Court declared in the clearest and most emphatic manner that the circuit court should have included the testimony in the record in order that its ruling thereon might be subject to review.

The rule above adverted to would be directly applicable to the situation which might arise on the final hearing of this cause before the United States Circuit Court for the District of Minnesota. If that court should by any possibility be of the opinion that any of the evidence adduced or sought to be adduced, whether within or without the district, was inadmissible for any reason, it would nevertheless be compelled to have such evidence received and incorporated into the record for the use of this court. *A fortiori,* the rule is applicable to the situation existing in the Circuit Court for the Eastern District of Wisconsin.

The objections interposed by counsel for the defendants, as the ground for refusal, raised questions of law which will ultimately have to be considered by any tribunal to which the cause may be taken on appeal. The court in Wisconsin is not

even the appropriate tribunal for their decision in the first instance. That function rests with the Circuit Court for the District of Minnesota. If these witnesses are permitted to persist in their refusals to answer, upon the grounds stated, the Circuit Court in Wisconsin will have assumed to pass finally upon substantial questions of law in a cause not pending before it. Although the witnesses sought to be examined in the cause are personally subject to the jurisdiction of that court, the case itself is not. The aid of the court, has, to be sure, been invoked to compel the attendance of witnesses before the examiner, but for that purpose and to that extent only. The court in Wisconsin is concerned only with compelling obedience to its duly issued writ of subpoena. If it be urged that in considering the question of compelling such obedience the court must necessarily pass upon the admissibility of the evidence, we say that the decision in *Blease v. Garlington* is a complete answer to that suggestion. The court cannot by any possibility consider these questions. Its only course is to direct the witnesses to obey its subpoenas by answering the questions put to them and producing the books and papers called for. We concede that the court in Wisconsin may protect the witnesses within its jurisdiction against

violation of their personal and constitutional privileges. That branch of the subject, however, will be dealt with later. The rule of *Blease v. Garlington* has been interpreted and applied in the following cases:

Thomson-Houston Elec. Co. v. Jeffrey Mfg. Co., 83 Fed. 614.

Maxim-Nordenfelt Guns & Am. Co. Ltd. et al, v. Colt's Patent Firearms Mfg. Co., 103 Fed. 39.

Parisian Comb Co. v. Eschwege, et al., 92 Fed. 721.

Fayerweather, et al., v. Ritch, et al., 89 Fed 529.

Appleton v. Ecaubert, 45 Fed. 281.

Edison Elec. Lt. Co. v. U. S. Elec. Ltg. Co., 45 Fed. 55, 59.

Johnson Steel Street Rail Co. v. North Branch Steel Co., 48 Fed. 196.

Adee v. J. L. Mott Iron Works, 46 Fed. 39.

Lloyd v. Pennie, 50 Fed. 4.

Brown v. Worster, 113 Fed. 20.

MacWilliam v. Conn. Web. Co., 119 Fed. 509.

Whitehead & Hoag Co. v. O'Callahan, 130 Fed. 243.

The only case we have been able to find in the reports giving a contrary view to that indicated in the authorities above cited is *In Re Allis,* 44 Fed. 216. There the court had before it an application for an order to require a certain witness to produce documents and answer interrogatories before an examiner in a suit pending in the Circuit Court of the United States for the District of Minnesota. The witness was not himself a party to the suit. Judge Jenkins held that the court, having jurisdiction of the witness, had power to judge of the materiality and pertinency of evidence in considering an application of this kind. His opinion discussed the subject as if the question raised was one of personal privilege. Moreover, the case of *Blease v. Garlington* does not appear to have been called to his attention, and he rested his decision upon two cases decided in 1853, more than ten years prior to the amendment of equity rule sixty-seven, and more than twenty years prior to the decision in *Blease v. Garlington.* Furthermore, the first of the cases relied upon, namely, *In Re Judson,* 3 Blatchford 148, Fed. Cases No. 7563, was one where the witness, an attorney, pleaded that the question called for the disclosure of a privileged communication between him and his client. The other case, that of *Ex Parte Peck,* 3 Blatchford 113,

Fed. Cases No. 10,885, went off on another point, namely, the lack of proof of jurisdiction in the officer before whom the examination was had.

(*B*) *The evidence called for is admissible.*

The refusals of the several witnesses are so numerous that we have found it desirable to classify them, as far as possible, under a few general headings based upon the subject matter to which they relate. As an appendix to this brief, we have printed this classification, and shall refer thereto from time to time in this sub-division of the brief.

1. Questions put and requests made with reference to the record book of the defendant General Paper Company.

A great many of the refusals scheduled with reference to the witness Alexander's testimony related to the record book of the defendant General Paper Company. This applies to the refusals numbered from 1 to 25 inclusive, 35, 38, 39, 40 to 44 inclusive, 72 to 79 inclusive. This book was the official record of all the meetings of the stockholders and directors of the General Paper Company from the time of its organization to the present time. This book was produced by the witness Alexander, who

is Secretary of the Company, and who kept it and had charge of it. (Transcript of Record, p. 140.)

"Q. You are the Secretary of the General Paper Company, are you not?

A. I am.

Q. And Treasurer of the General Paper Company?

A. Yes, sir.

Q. As Secretary you have charge of the minute book containing the records of the meetings of the board of directors and stockholders of the company?

A. Yes, sir."

After some further questioning with regard to a particular meeting reported in said book, the examination proceeded (page 141):

"Q. Were there minutes kept of that meeting?

A. I think so.

Q. Have you those minutes?

A. I think so.

Q. Will you produce them please?

Mr. Flanders: You have got them here, you mean?

A. Yes, sir.

Mr. Flanders: Well, hand them over to me, please.

(Witness leaves stand to get records.)"

Again, on page 148, the same witness testified:

"Q. You are the Secretary of this company, at the present time, are you not?

A. I am.

Q. And the records are in your charge, are they not?

A. They are."

Again, on page 153, the witness testified:

"Q. Where is the office of the General Paper Company in this town?

A. In the Wells building.

Q. Is that your office?

A. Yes, sir.

Q. Do you keep there the records of the meetings of the board of directors and stockholders of this company?

A. Usually I do."

We have quoted from the testimony on this subject for the reason that throughout the examination of this witness the counsel for the defendants took

the position that this book was not in the possession of the witness and had not been produced by him, but on the contrary, was in the possession of Mr. James G. Flanders, counsel for the General Paper Company. This and other books under the care and control of the witness as an officer of the General Paper Company had been turned over to Mr. Flanders some time prior to the hearing, although it definitely appears that so far as some of the other books were concerned, at any rate, the witness actually brought them to the hearing from Mr. Flanders's office and left them in his seat when called to the stand. He went and got the record book, as above appears, when it was called for, and then turned it over to Mr. Flanders in the presence of the examiner. (Transcript of Record, pgs 140 to 141.) The attitude of counsel for the defendants on this subject is well illustrated by his statements made on pages 148, 149, 150, 155 and 261.

Page 148:

> "Do you refuse to produce the record of the meeting of the board of directors showing Mr. Alexander's election as Vice President of the General Paper Company—or Mr. Stuart's as Vice President of the General Paper Company?

Mr. Flanders: Under the direction of counsel for the General Paper Company the witness states that the record books—

Mr. Kellogg: Now wait, the witness does not state that.

Mr. Flanders: Now, the witness does state it. We will have this taken down or we will stop right here, whichever you have a mind to. Whatever I say is to go in the record.

Mr. Kellogg: All right, say it.

Mr. Flanders (continuing his statement): —and papers of the General Paper Company are in the general charge of James G. Flanders, counsel for the General Paper Company, who now has that record book in his possession, and under the direction of counsel he declines to open that book generally to the inspection of counsel upon the other side, either at this meeting or at any other time, in the present state of the record, and offers now to read this portion of this meeting relating to the election of Mr. Stuart as second vice president of the General Paper Company, or to submit that portion of that meeting to the inspection of counsel. Is that your answer?

Do you adopt that answer?

Witness: I do."

Page 150:

"Mr. Flanders: Now this book is in my possession and you will take it as I give it to you or not at all."

Bottom of page 155:

"Mr. Flanders: Mr. Alexander will read nothing from any books in my possession without my permission. And you adopt that position, do you, Mr. Alexander?

Witness: I do."

The witness Alexander either produced this book or he did not produce it. If he did not produce it at all, he has clearly disobeyed the subpoena. If he did produce it in the first instance and then turned it over to counsel for the defendants in the presence of the examiner, we cannot see but that in effect such a proceeding is as much a violation of the writ as if he had not produced the book at all.

In *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Federal, 294, it was distinctly held that a party cannot excuse non-compliance with a *subpoena duces tecum* commanding him to produce documents unpriviledged in his own hands, by showing that he has delivered them into the hands of his

counsel. Moreover, the possession by an agent or attorney or partner, is possession by the person himself. *Russell v. McLellan,* Fed. Cases No. 12158, and cases there cited.

We submit that the record book in question was produced and remained in the power and control of the witness Alexander during all of the time that he was testifying. The mere fact that, as appears from the testimony, he passed it over to counsel whenever he was asked any question calling for an inspection of it or a reading from it, cannot excuse him in the slightest degree. The possession of counsel was the possession of Mr. Alexander. We do not believe the court should countenance the contention that a witness may deliberately, and in the presence of an officer of the court, relinquish from his physical possession any book or paper which is once produced before the examiner, and relinquish it, as is abundantly apparent from the testimony, for the avowed purpose of making a technical plea in answer to questions put to him, that he is unable to produce the record and make full answer thereto. If such trifling expedients may be resorted to in legal proceedings before one of its officers, it is clear the dignity of the court is a mere name, and its process cannot command respect.

It will be seen that the witness Alexander not only refused to permit counsel for the government to inspect the record book, but that he refused to testify from it or permit it in any way to be offered in evidence except in a most fragmentary manner. Only such portions of the book could be used as the counsel for the General Paper Company saw fit to disclose. The witness, at his suggestion, even refused to inspect the book to refresh his own recollection. (Refusal No. 35, Transcript pages 273, 274). At one point in the examination it appeared from the testimony of the witness that a committee was appointed at the annual meeting of the stockholders in December, 1901, to take legal advice and report upon a proper plan for the completion of the subscriptions and paying up in full of the capital stock. After consenting to read the minutes relating to the appointment of the committee, the witness was asked to read the report of the committee. He thereupon started to read, and after reading what purported to be a part of the committee's report, he was stopped by counsel for the defendants. (Transcript, pages 205, 206). He admitted, in response to later questions, that he had not read all of the report, and flatly refused, under advice of his counsel, to read the rest of it. He admitted that he had the book

before him when he stopped reading, and that it was taken away from him by counsel for the defendants. (Transcript, pages 206, 208). The witness repeatedly refused to permit counsel for the government to inspect the record or any portion thereof, with a view to determining the accuracy of his own statements or those of his counsel relating to the contents.

The attitude of counsel for the defendants in relation to this record book seems entirely unwarranted by any principle of evidence which we have been able to discover. It must be borne in mind that the charge under investigation is one of conspiracy and combination on the part of twenty-three defendant corporations. This combination took on the outward semblance of a further corporation, the defendant General Paper Company. The combination and conspiracy to suppress competition among themselves and to restrain trade and commerce was effectuated and has been carried on under the guise and through the medium of this corporation known as the General Paper Company. Every act of the General Paper Company is therefore an act related to and in furtherance of the conspiracy and combination; every act of the Company is, to all intents and purposes, the act of the conspirators themselves; every act of that Company is therefore necessarily

proper and material evidence for the purpose of this inquiry. What evidence could exist which would have a more direct bearing upon the principal issue in the cause than these minutes of the meetings of the General Paper Company? They are *par excellence* the direct, as distinguished from the indirect or circumstantial, evidence of the combination and conspiracy. Here we have twenty-three competing manufacturing corporations getting together through their principal officers, and organizing a selling corporation to act as the exclusive sales agent for them all. Each manufacturing corporation has one representative on the board of directors of the selling company; each manufacturing corporation takes stock in the selling company in proportion to its output; each manufacturing corporation enters into the same contract, word for word, with the selling company, surrendering the right to sell its product. It would be difficult, we believe, to imagine a more complete *prima facie* case of combination and conspiracy to eliminate competition and restrain trade and commerce. This being so, the acts of the conspirators in furtherance of the combination and conspiracy, as evidenced by the minutes of the General Paper Company, are, under all of the authorities, clearly admissible. If the book had not been produced be-

fore the examiner at all, its production could have been compelled, and the use of its contents secured by an order to show cause supported by a proper affidavit of counsel for the government that the book was material.

Coit v. North Carolina Gold Amalgamating Co., 9 Fed. 577.

The rule is settled that where the existence of the books and papers desired is established, the ability to produce them is shown, and the books and papers are apparently important and material to the case of the moving party, their production will be required. It is obviously impossible in applications of this character to determine the materiality of all of the contents of the books and papers in advance. If the moving party were required to prove to the satisfaction of the court the materiality of such evidence, obviously he would in most cases be without remedy, for the contents of the books and papers in the possession of the opposite party usually cannot be known in advance. All that can be expected is that the books and papers desired shall be accurately designated, and that there should be some showing that they will prove to be material evidence. The rule was laid down by that eminent jurist, Judge Dillon, in the case of *United States v. Babcock*, Fed-

eral Cases No. 14484. That was a petition for an order for *a subpoena duces tecum* directed to one William Orton, not a party to the suit, but an officer of the Western Union Telegraph Company, requiring him to produce the records of his office showing the sending and receipt of telegrams between certain designated persons. Judge Dillon (Treat, District Judge, concurring), said:

> "It is to be observed that the District Attorney does state that these papers are material evidence in the case, but whether they are material or not is a question which cannot be determined in advance—that depends upon the actual posture and situation of the case when they come to be offered; and when the District Attorney asserts that they are material papers, we must assume for the present that he is fully informed and that they are material. * * * A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction."

In *Coit v. North Carolina Gold Amalgamating Co., supra,* it was held that the production of books and papers in possession of the opposite party might

be required in equity causes on motion supported by affidavit averring their materiality. The court stated that the practice had not been uniform in that respect, and that such motions had been allowed even without the support of an affidavit.

There is no doubt that as a witness a party can be compelled by a *subpoena duces tecum* to produce books, documents, and papers in his possession in the same maner as any other witness. ***Bischoffsheim v. Brown,*** 29 Fed. 341, 343.

And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence.

Wertheim et al. v. Continental Ry. & Trust Co., 15 Fed. 716;

Johnson Steel Street-rail Co. v. North Branch Steel Co., 48 Fed. 196;

Edison Elec. Lt. Co. v. U. S. Elec. Ltg. Co., 44 Fed. 294; 45 Fed. 55.

In *Johnson Co. v. North Branch Co.,* 48 Fed. 191, it appears that the Circuit Court for the Western District of Pennsylvania required a witness, not a party to the suit, to produce certain drawings which seemed to be pertinent to the issue. This was done, although the papers related to a valuable secret method of producing a manufactured article.

The case of *Bloede Co. v. Bancroft & Sons Co.*, 98 Fed. 175, has an important bearing upon this discussion. That was a motion made in an action at law under section 724 of the Revised Statutes, for an order requiring the defendant to produce at the trial, for inspection by the plaintiff and its attorneys and agents, certain books and writings alleged to be in the possession or under the control of the defendant, and to contain certain evidence pertinent to the issues. Briefly stated, the call was for the "books, papers, writings, accounts, day books, blotters, journals, ledgers, cash books, letter books, order books, shipping bill books, invoices of goods bought or received of the defendant, in the possession of the company, its officers, servants or agents," etc., containing entries in relation to certain matters. It was objected by the defendant that there was a fatal loss of particularity in the description of the books and writings of which production was sought. The court said (page 188):

> "The plaintiff, from the nature of the case, in the absence of information, and as stated in the supporting affidavit, has not the ability to describe with particularity the books or writings containing evidence pertinent to the issue and referred to in that affidavit. The

> defendant, however, can, without difficulty, ascertain and produce the books and writings containing such evidence. To require the plaintiff specifically to point out the books or writings would be to demand of him an impossibility. * * * No reason, therefore, is perceived, why under Section 724, generality in the designation of books or writings is objectionable, if the subject matter to which they relate is specifically mentioned in the motion and notice."

The notice and motion in the *Bloede* case were obviously far more sweeping and general in their terms than the request involved in this application. Here the book is not only specifically designated, but it has been before the examiner and portions of it, at least, have been incorporated in the record. It is further shown that the book contains the record of what took place at the meetings of the directors and stockholders of the General Paper Company. To require the government to designate the particular portions of this book which it regards as necessary to its case, would be to demand of it what the Circuit Court for the District of Delaware would call an impossibility. It is sufficient for the purpose in hand that it should appear that the book contains the rec-

ord of the doings of the various representatives of the manufacturing corporations defendant at meetings of the General Paper Company. These meetings, whether they be stockholders' meetings or directors' meetings, were simply gatherings of the parties to the alleged combination and conspiracy to take action in continuation of and in furtherance of the combination and conspiracy; and the records of the meetings are nothing more nor less than the formally recorded acts of the parties.

The court for the Delaware circuit in the *Bloede* case cites the decision of Judge Dyer sitting for the Eastern District of Wisconsin in the case of *United States v. Three Tons of Coal,* 6 Bissell, 379. There, informations having been filed on behalf of the United States in several cases of seizure under the internal revenue laws, orders were made requiring the claimants in the respective cases to produce certain books and papers for examination by the attorneys of the United States. The proceeding was had under an act of Congress providing that in suits and proceedings arising under the revenue laws, the attorneys representing the government might, whenever in their belief any business book or paper belonging to or under the control of the claimant would tend to prove an allegation made by the United States, make

a written motion for an order requiring the production of such book or paper; whereupon the court at its discretion might issue a notice to the claimant to produce it. The statute in question does not appear to be in any respect broader in its scope than Section 724 of the Revised Statutes, and certainly did not confer upon the court any broader powers than those possessed by a court of equity with regard to the production of books and papers. The motion in the case before Judge Dyer was most general in its character. Nevertheless, it was held to be sufficient. The court said (pages 404, 405):

> "Nor do I think I should dismiss these proceedings or vacate the orders made, on the objection that the motion papers do not describe with sufficient particularity the books and papers required. They are specified in the motion as the day-books, blotters, journals, ledgers, cash books, letter books, shipping bill books, and receipts for spirits and liquors shipped, and invoices of spirits and liquors bought or received, used and kept by the parties in their business as distillers or rectifiers, between certain dates named in the written motion. This is a sufficient designation of the books and papers to meet the requirement

of the statute. The books and papers are specified, the business in which they were made, kept and used, is named and dates are given."

That under issues of the character raised in this cause, the entire manner of conducting the business of the General Paper Company is competent and material evidence, is settled by the decision of the Supreme Court of the United States in the recent case of *Interstate Commerce Commission v. Baird*, 194, U. S. 25. There the complaint filed against the defendants before the Interstate Commerce Commission charged that the defendants as common carriers, engaged particularly in the transportation of coal mined in Pennsylvania and other states, and shipped to tide-water, were charging unreasonable and unjust rates, and subjecting consumers and producers of coal who were not common carriers or corporations owned and controlled by common carriers, to undue and unreasonable prejudice and disadvantage in favor of and to the undue and unreasonable preference and advantage of the defendants themselves and companies under their control. After issue was joined, a hearing was had at which certain witnesses refused to produce contracts and answer questions. The contracts

asked for were those between the defendant common carriers and various coal companies owned and controlled by them. Application was made to the Circuit Court to compel the production of the papers and to compel the witnesses to answer the questions. It was objected to on the part of the defendants that the questions did not relate to any subject which the commission had the right to investigate, and that the contracts related to the private business of persons not parties to the procedings before the commission. The defendants further pleaded that the witnesses were protected by their constitutional privileges, and also that the contracts were not relevant to the subject matter of the investigation before the commission. The Circuit Court decided in favor of the defendants on the application, on the ground that the matters sought to be inquired into were not relevant to the investigation. The Supreme Court of the United States, however, reversed this ruling and held that the evidence was relevant to the issues, under the allegations made in the complaint.

The issues in the *Baird* case were in many respects similar to those raised here. The complaint before the Interstate Commerce Commission virtually charged that the defendant railroad companies were in a pool, and that they favored, in making

rates, certain coal companies which they owned and controlled. The officials of the railroad companies were also officials of the coal companies, as appears from the passages quoted from the opinion. The court held that the manner of conducting the business of these railroad companies, and especially their business relations with the coal companies owned and controlled by them, were material and relevant matters to be inquired into, and that the production of contracts and the giving of testimony divulging the facts in that regard would be compelled. Can there be the slightest doubt that, if these railroad companies had done business through a central dummy corporation, the court would have declared the manner of conducting the business of that corporation material and relevant to the issues, and required testimony to be given and documents to be produced in relation thereto? On the view advanced by the court in that case, it seems clear that the record-book of such a corporation as the General Paper Company is admissible to prove the allegations of a combination or conspiracy among the parties organizing it.

The refusals on the part of the witness Alexander to testify from the record, which he produced, or to permit an inspection thereof, were, we apprehend, based upon a total misconception of the duties

and responsibilities of a witness. Mr. Alexander is not a party to this cause. He was summoned merely as a witness, and directed to produce books and documents in his possession and under his control, which were deemed necessary and material to a full and complete inquiry into the facts through him as a witness. His duty was simply to tell the truth, regardless of whose interest it might affect. It could make no possible difference to him that the testimoney which he was called upon to give might ultimately prove immaterial to the issues between the parties. He could refuse to testify only upon the ground of some claim of privilege purely personal to himself. Unless his claim in that regard (which we shall hereafter examine) is well founded, he stands before the court utterly without excuse for his refusal to testify. The duty to give testimony is a duty to the state, and not to the parties.

Wigmore on Evidence, §§ 2195 and 2210.

The same learned author says (section 2196):

> "The claim of privilege can be made solely by the witness himself; the privilege (as the common phrase runs) is purely personal to himself. Whether he chooses to fulfill his duty without objection, or whether he prefers to exercise the exemption which the law con-

cedes to him, is a matter resting entirely between himself and the state (or the court as its representative). The party against whom the testimony is brought has no right to claim or to urge the exemption on his own behalf."

Brown v. Walker, 161 U. S. 597, and cases noted;

Morgan v. Halberstadt, 60 Fed. 592;

Wertheim v. Cont. Ry. & Trust Co., 21 Blatchford, 246;

New York Life Ins. Co. v. People, 195 Ill. 430;

U. S. Express Co. v. Henderson, 69 Iowa, 40;

Gibbons v. Co., 5 Price, 491.

This witness has subjected himself throughout the examination, entirely to the control of the parties against whom his testimony was sought, and unless his claim of personal privilege is sound, has violated his duty in order to protect the interests of those parties. There can be no distinction between his refusals to answer and his refusals to produce books and papers. The books and documents in a man's possession are as much subject to the calls of justice as are the faculties of speech and memory. In the words of Chief Justice Shaw:

"There seems to be no difference in principle between compelling a witness to produce a document in his possession under a *subpoena duces tecum* (in a case where the party calling the witness has a right to the use of such document), and compelling him to give testimony when the facts lie in his own knowledge."

Bull v. Loveland, 10 Pickering, 9.

The only interests which could in any way be affected by the disclosure of the minutes of the meetings of the General Paper Company are the interests of these defendants in regard to the very subject matter of this litigation. The General Paper Company, under its articles, and as disclosed by the evidence thus far taken in the cause, had no business except that connected with this combination and conspiracy. It has never been a selling agent for any parties except the defendant manufacturing corporations. Its entire scope of operation is confined to the continuation and carrying out of the alleged combination and conspiracy. Under these circumstances, can it be said that the attempt to secure these minutes to be offered in evidence is prompted by idle curiosity? If so, then the same plea is open to any conspirator whose acts are being scrutinized in proceedings of this kind.

2. Reports of the Treasurer and the Manager of sales of the General Paper Company, and contracts for the sale of news print paper to publishers.

The witness Alexander was the Treasurer as well as Secretary of the General Paper Company. It appears from the testimony that he made reports as Treasurer, and that the reports were usually in his care and custody. (Transcript of Record, page 274.) When questioned with reference to the character of the reports and in a preliminary way with reference to their general contents, he refused to answer. (Pages 274, 275.) He even refused to state in the most general way what the report of the Treasurer dealt with so as to identify it. (Pages 274, 275.) He refused to state whether or not his reports show the total sales in value each year made by the General Paper Company. (Page 274.) All of these refusals were based simply upon the ground that the matters called for were immateral. With regard to the preliminary question as to what the reports had reference to, counsel also made the objection that the reports were the best evidence. These matters are covered by the refusals numbered in the schedule 36, 37 and 63.

The witness Stuart was for a portion of the time since the organization of the General Paper Com-

pany the Manager of Sales, and since September, 1903, he has been Second Vice President of the General Paper Company in charge of the sales department, the Sales Manager and other salesmen being under his direction and control. This sales department had to do with the sale of all of the paper produced by the mill corporations, and covered by their contracts with the General Paper Company. It appears that the sales manager made reports at the annual meetings of the stockholders of the General Paper Company. (Page 263.) Whether a report was made by the sales manager to the board of directors does not appear, as the witness refused to answer a question calling for that fact. (Page 297.) He was asked whether the minutes of the directors or stockholders showed that a report was made each year by the sales manager. Under advice of counsel the witness (page 297) refused to answer this question, although he had previously (page 263) stated that the sales manager usually made a report at the annual meeting of the stockholders. Questions were afterwards put to him separately as to whether the annual meetings of the stockholders or of the directors showed any report by the sales agent, and he refused to answer. (Tr. of Rec. in Wis. cases, page 297.) The witness also refused to

answer similar questions with regard to the annual meetings of the boards of directors in 1900, 1901, 1902, 1903 and 1904. (Pages 297, 298.) These refusals to make any answers respecting the reports of the sales agent are numbered 70 to 76, inclusive, in the schedule.

The refusal to make any disclosure whatever concerning the reports of the treasurer and of the sales manager was followed by refusals to give any information concerning the sale of paper by the General Paper Company. Refusals 61 and 62 in the schedule of refusals by the witness Alexander refer to questions found on page 296 of the transcript, where the witness declined to state whether he knew the total value of the sales for each year made by the General Paper Company. He then refused to state whether his reports as treasurer, or whether any books in his possession, showed the total sales in value for each year, or whether said sales amounted in value to approximately ten million dollars. (Tr. of Rec. page 296.) The witness Stuart declined to testify at all as to the amount, in weight, value, or kind, of sales of paper made by the General Paper Company. (Stuart's Refusals 1 to 9, inclusive; Trans. of Record pages 361-363.)

The witnesses called in Minnesota also refused to give any information concerning the reports of the treasurer or of the sales manager. After admitting that they were present at the time the treasurer's reports were made, and that they had examined such reports, the witnesses declined to state whether the profits, gross and net earnings, or the total sum distributed as dividends, of the General Paper Company, were shown in the reports. They declined also to give any information respecting the contents of the reports of the sales agent, and one witness refused even to state whether he was ever present when the report was produced. (Tr. of Rec. in Minn. cases, page 145.)

Among the documents which the officers of the General Paper Company were directed by the subpoena to produce were the contracts made with publishers throughout certain states and territories for the sale of news print paper. The witness Alexander testified (Tr. of Rec. in Wis. cases, page 293) that he did not have the contracts in question, and, when asked in whose possession they were, he answered that they were usually available for the selling department and were customarily under the supervision of the sales manager. His testimony was apparently evasive for, when asked whether

they were under his control, he answered "No sir, not absolutely." (Page 293). He also testified as follows (page 294):

> "Q. Well, I don't understand whether you have testified as to whether you are the custodian of such documents?
>
> A. Well, technically, I might be considered the custodian, but usually they have been under the supervision of the general manager of sales.
>
> Q. Could you get them any time you desired?
>
> A. I would have to consult the counsel."

Counsel for the defendants, as he usually did when the question of books and papers was raised, stated that he had possession of the papers and that counsel for the Government might assume that they were present in court. When asked whether he would produce them for inspection, he answered "No." On the question of the possession or control of these contracts, the witness Stuart testified as follows (Tr. of Rec. in Wis. cases, pages 351, 352):

> "Q. Have you the contracts that you have made in the name of the General Paper Company, selling news print paper to these publishers, that are in force at the present time?

A. No sir.

Q. Where are they?

A. They are in the office of Mr. Flanders, I presume.

Q. Who gave them to him?

A. Mr Alexander, I presume.

Q. Are they in your charge?

A. No sir, I never keep them in my charge.

Q. Who has charge of them?

A. They pass immediately to the accounting department.

Q. Is Mr. Alexander at the head of the accounting department?

A. Mr. Alexander is at the head of the accounting department, but some time in their course they go to the order clerks.

Q. I want to know who is in general charge of them?

Mr. Flanders: If you want to go all over this thing again, you may do it.

Mr. Kellogg: Mr Alexander said he is not in charge.

Mr. Flanders: I have already told you, for the purposes of this case, you might assume these contracts were here, and we decline to produce them. Now, that is as square as you can get it on the record."

The witness Alexander further refused (page 295) to answer the question as to whether the contracts with publishers were usually on a printed blank. After stating that they were usually in the same general form, he declined to say where that form of contract was procured, and whether it was not taken from a form used by the International Paper Company (page 295).

These refusals all relate to the manner of conducting the business of the General Paper Company. They indicate the persistent policy on the part of the witnesses as officers of the General Paper Company, of declining to make any disclosures whatever with regard to the manner in which the business was carried on. Many of the questions remaining unanswered are of the most general and preliminary character. The government was not even permitted to go ahead and lay its foundation for calling for the production of the reports of the Treasurer and of the Sales Manager. It must be clear that reports of such officers as these are important and material to any proper trial of the issues involved in the cause. They would necessarily disclose not only that the General Paper Company did sell certain products of all of the manufacturing corporations defendant, but how these products were sold, to whom they were sold,

through what territory they were sold, and upon what terms and conditions the sales were made. These defendants other than the General Paper Company declare in their answers that they are still competing with one another in the sale of their product. Whether or not they are so competing is one of the vital issues in this case. Is it not then of the highest importance for the Government to show just how their product is being sold? Every detail of the machinery for the disposition of that product becomes, in view of this contention, a material fact in the controversy. All of the conditions upon which and the prices at which sales were made have a bearing upon the question whether this alleged competitive state of trade exists. The forms of the contracts for the sale of various grades of paper are material; every element of uniformity, every indication of concerted action is significant. The manager of sales of the General Paper Company was but the agent appointed by these individual mills to dispose of their product. What he reported to his principals at the stockholders' and directors' meetings manifestly would throw light upon the relations among them and the true nature of the combination which they had made and were carrying out. The reports of the Treasurer would un-

doubtedly show the total receipts from sales, subscriptions to stock, expense of management, earnings and profits, and disbursements in dividends. Are not all of these material things to consider in this case? For example, is it not material for the Government to show that each one of these manufacturing corporations defendant is a participant in the profits of the General Paper Company derived from the sale of the products of all of them together? Would not that fact bear directly upon the issue as to whether they have by the organization of the General Paper Company suppressed competition as among themselves? The allegation of the 4th paragraph of the Government's petition is that these manufacturing defendants entered into an agreement, combination and conspiracy with each other to restrain the trade and commerce among the several states, and to control, regulate and monopolize said trade and commerce. The third paragraph of the petition states that these defendants comprise substantially all of the manufacturers of paper within the territory where they operate. This latter allegation is denied by the defendants in their answer. In view of this issue, is it not material to show the total sales in value and in weight made by the General Paper Company, in

order that such totals may enable the court which has to pass upon these questions finally, to determine whether or not these defendants do comprise substantially all the manufacturers of paper in the territory in question, and whether or not they have attempted to monopolize trade and commerce in this commodity? These reports of the sales manager will be material on the further ground that according to the contention of the Government, they would show a pooling of the product of the various mills. The Government is attempting to show, among other things, as is apparent from the questions addressed to the witness Harmon, that as to certain grades of paper handled through the General Paper Company, a flat or arbitrary price is fixed at which that company credits the mills, and that the amount realized over and above that price, after deducting commissions and expenses of management is distributed among the mills in proportion to their output. Such an agreement, if it exists, would be the most convincing possible evidence of the combination and conspiracy alleged in the petition, and the Government should be entitled to show it in practically the only way in which it can be shown. In addition to this, reports of the sales manager have, of course, a direct bearing upon the question of the

control of the General Paper Company over the prices and terms of sale.

Practically all that has been said in connection with the materiality of the record book of the General Paper Company is applicable to the question now under consideration. We reiterate our conviction that every act of the General Paper Company as the form and entity which this combination and conspiracy assumed, is a fit subject for investigation under the issues that have been framed. All of its acts were done by the administrative officers of the selling company at the instance of the duly authorized representatives of the manufacturing corporations sitting upon its board of directors. They are the acts of the conspirators in continuation of and in furtherance of the objects of the conspiracy itself. It is an elementary principle of evidence that where two or more persons are associated together for some illegal purpose the acts or declarations of any one or more of them in reference to the common object are admissible against them all.

1 Greenleaf on Evidence, Sec. 111;

2 Wigmore on Evidence, Sec. 1079;

American Fur Co. v. United States, 2 Peters, 358; 8 Curtis, 138;

Clune v. United States, 159 U. S. 593;

Wiborg v. United States, 163 U. S. 656;
Lincoln v. Claflin, 7 Wallace, 138;
Conn. Mutual Life Ins. Co. v. Hillmon, 188 U. S. 219;
United States v. Newton, 48 Fed. 218;
United States v. Gooding, 7 Curtis, 286; 12 Wheaton, 460;
Nudd v. Burrows, 91 U. S 427;
United States v. McKee, 26 Fed. Cases, No. 15685;
State v. Winner, 17 Kansas, 305;
State v. Thompson, 69 Conn. 720; 38 Atl. Rep. 869;
Hunter v. State, 112 Ala. 77; 21 So. Rep. 65;
Lee v. Lamphrey, 43 N. H. 1;
Apthorp v. Comstock, 2 Paige's Chancery, 481;
Jackson v. Summerville, 13 Pa. St. 359;
Burns & Stevens v. McCabe, 72 Pa. St. 309;
Confer et al. v. McNeal, 74 Pa. St. 112.

The acts sought to be shown through the officers of the General Paper Company are the acts not merely of one of the conspirators, but of all of them acting jointly in reference to the common object. On every possible view of the principles and authorities the acts must be material and admissible.

3. Evidence concerning meetings preliminary to the organization of the General Paper Company, and declarations made by witnesses during the formation of the combination and conspiracy.

Another group of refusals to answer has reference to the evidence of meetings preliminary to the organization of the General Paper Company and to the declarations of the witnesses on the subject of intention, pending the formation of the conspiracy, or during its continuance. The witnesses Alexander and Whiting flatly refused to testify on the subject of any preliminary proposition of making the Manufacturers Paper Company, of Chicago, Illinois, the sales agent for all or a portion of the manufacturing corporations defendant. The government was attempting to show that, shortly prior to the actual organization of the General Paper Company, the representatives of the manufacturing corporations defendant met and discussed the proposition of placing their product with the Manufacturers Paper Company for sale, and finally actually had a meeting with the representatives of the Manufacturers Paper Company at which meeting the whole subject was gone over. The Government also sought to elicit information concerning an arrange-

ment with the Manufacturers Paper Company, in or about the month of January, 1902. The witness Alexander refused to give any information on that subject. (Refusals 78 and 79; Trans. of Record in Wis. cases, page 298.)

The witness Alexander was questioned with reference to an alleged interview, given by him to a reporter of the "Paper Trade Journal" at Appleton, Wisconsin, on June 18, 1900, either during or just after the meeting of the board of directors on that date. He declined to answer any questions on the subject. (Refusals 26, 27 and 28; Tr. of Rec. in Wis. cases, pages 236-238.)

The witnesses called in Minnesota, who were officers of constituent companies and also directors in the General Paper Company, adopted the same position with reference to the preliminary negotiations for organizing the General Paper Company. The witness McNair, whose company did not join until 1902, refused to give any information whatever concerning facts leading up to the making of a contract by his company with the General Paper Company. (Trans. of Rec. in Minn. cases, pages 149-151.) The questions addressed to him in this particular were obviously designed to bring out the fact that the Northwest Paper Company was forced

to go into the combination by reason of threats made by the officials of the General Paper Company.

There cannot be the slightest doubt that the testimony relative to the meeting with the representatives of the Manufacturers Paper Company, and the proposition to make it the general selling agent, is evidence of the most material kind, tending to characterize the combination thereafter effected under the name of the General Paper Company. This meeting took place during a period of time when it is admitted by the witnesses Whiting and Alexander that the representatives of the defendant manufacturing corporations were holding conferences which led up to the organization of the General Paper Company. Any tentative plans that they may have had during that period, and any proposition that they may have made to the Manufacturers Paper Company to undertake the sale of their product, must constitute the best possible evidence of the intentions and purposes of the parties who organized the General Paper Company.

The law on this subject has long been established. We need only refer to the opinion of Mr. Justice Field in *Lincoln v. Claflin*, 7 Wal. 132.

We are aware of the general rule that ordinarily some *prima facie* evidence of the conspiracy

must be offered before the declarations of co-conspirators can be received in evidence. For reasons already adverted to, we believe that the conspiracy had been proved long before the questions concerning the declarations of the witnesses were put. Even if this were not so, the general rule is always relaxed where proof of the conspiracy depends upon a vast amount of circumstantial evidence, or a number of isolated and independent facts. In such cases it is in the sound discretion of the court to allow the declarations in advance of proof of the conspiracy.

1 Greenleaf on Evidence, 111;

State v. Thompson, 69 Conn. 720; 38 Atl. 870.

State v. Winner, 17 Kansas, 305.

In cases of conspiracy, the admissions of the accused conspirators are always a fruitful source of evidence. Only in exceptional cases is the conspiracy shown by direct and positive evidence. The proof is usually indirect and circumstantial, and courts are bound to rely in large measure upon the admissions made by the conspirators either during or after the accomplishment of the common purpose.

State v. Thompson, 69 Conn. 720; 38 Atl. 870.

Clune v. United States, 159 U. S. 592.

United States v. Hutchins, 26 Fed. Cases No. 15430.

United States v. Hamilton, 26 Fed. Cases No. 15288.

The Mussel Slough Case, 5 Fed. 680.

United States v. Babcock, 3 Dillon, 581.

United States v. Lancaster, 26 Fed. Cases No. 15557.

Davis v. United States, 107 Federal, 753. (C. C. A. 6th Cir.)

The questions addressed to the witness Whiting with reference to the preliminary agreement or understanding about the organization of the selling company, the proportions in which the stock was to be divided, etc., relate unquestionably to the formation of the combination or conspiracy. They call for direct testimony on the subject. So also, the questions concerning the negotiations with representatives of the defendants Itasca Paper Company and Northwest Paper Company, are material for the same reason. These companies came into the combination after its inception, and it would seem that the circumstances surrounding their joining must be admissible on any theory. The Petoskey Fibre Paper Company is a defendant which has been dropped from the board of directors of the General Paper Company. Whether or not it was so dropped, because it had declined to renew its contract with the Gen-

eral Paper Company, has a bearing upon the general plan of organization of this combination. That any negotiation had between the General Paper Company and the International Paper Company, with regard to the latter keeping out of the western territory, are admissible, should need no argument. Any attempt on the part of the General Paper Company and its officers to make any such arrangement must necessarily characterize the combination and throw light upon the purposes for which it was formed.

4. Refusals to answer on the subject of the manufacture and sale of butchers' fibre.

It appears that butcher's fibre is a grade of wrapping paper manufactured by the defendant manufacturing corporations, and covered by the contracts made by them with the General Paper Company. Since its organization the General Paper Company has therefore had the exclusive right to sell all the butcher's fibre manufactured by the defendants. Questions were addressed to the witnesses Alexander and Whiting, designed to bring out the fact that butcher's fibre is less profitable to manufacture than the other grades of paper covered by

the contracts, and that, in order to induce some of the manufacturing defendants to make it, and thus supply the market, an agreement or pool was formed among the fibre mills, whereby the mills undertaking to manufacture this grade of paper were compensated by the others. The questions were further directed to showing that the contributions made by mills not manufacturing butcher's fibre were made on the basis of information supplied by or through the General Paper Company. In other words, it was sought to show that the defendants had carried out the purpose of eliminating competition among themselves to the extent of pooling their losses as well as their profits. The witnesses emphatically declined to answer any questions on this subject. (Whiting's refusals 16 to 18, inc.; Alexander's refusals 45 to 56, inc.)

The officers of the constituent manufacturing companies took the same stand as the officers of the General Paper Company, and declined to answer even the most general preliminary questions relating to the manufacture and sale of butcher's fibre. (Tr. of Rec. in Minn. cases, pages 114, 115, 116, 138 and 139.)

The only ground of refusal given was that the evidence was incompetent and immaterial.

The materiality of this evidence is so manifest that we are almost at a loss to know how to argue the question. We can conceive of no fact, or series of facts, which would go so far to characterize this combination, and to determine the status of the various defendants in their relations to one another, as the facts sought to be adduced on this subject of the manufacture of butcher's fibre. It was a grade of paper of which the General Paper Company had the exclusive sale, under the contracts in evidence. The fact that it was less profitable to make than other grades led to the formation of the pool, in order that the demand for it might be met. This pool, if it existed, is conclusive proof of the fact that competition among the defendants has been eliminated, at least as to this grade of paper. *Smiley v. Kansas,* 196 U. S. 447.

5. Refusals to answer questions relating to the making of prices, the equalization thereof, and the division of profits, as between the General Paper Company and the manufacturing corporations.

Most of the questions propounded to the witness Harmon, and many of those asked of the witnesses Nelson, Bossard and McNair, were designed to elicit information on the subject of the precise arrangement between the General Paper Company and the

constituent companies, for the disposal of the prod uct of the latter. Counsel for the government repeat edly asked, with reference to both hanging paper an news print paper, whether there was not a stated o fixed price for these grades of paper, with which th manufacturing corporation was credited in the firs instance by the General Paper Company, an whether the mill did not thereafter receive a pro portion of the amount realized by the General Pape Company from the sale of the paper over and abov that fixed or stated price after deducting commis sions and expenses of management. All question on this subject remained unanswered.

That the information called for was competen and material to the issues seems almost too clear fo argument. If, as the questions assume, pape manufactured by the mills was turned over to th General Paper Company at a certain flat price, an the amounts realized over and above that pric through the sale of the product, after deductin commissions and expenses, was proportionatel divided among the mills manufacturing the variou grades of paper respectively, what better evidenc could be required to establish the averments of th original petition filed by the Government in th cause? Such an arrangement among the mills woul

amount *per se* to a deliberate agreement for the elimination of competition among themselves, and hence to a combination and conspiracy in restraint of trade, as charged.

In this connection may also be considered the refusals on the part of the witness McNair (Tr. of Rec. in Minn. cases, page 140) to give information concerning the basis of distribution, or apportionment, among the various manufacturing companies, of contracts made by the General Paper Company with publishers for the sale of news print paper. Any plan for the distribution or apportionment of such contracts would, for the reasons above given, clearly amount to an agreement to eliminate competition.

6. Refusals to answer on the subject of Dividends of the General Paper Company.

The witnesses persistently refused (Alexander's refusals 66 to 69, inc.; Stuart's refusals 10 and 11; Nelson's refusals 26 and 27; Bossard's refusals 13 and 14; and McNair's refusals 28 and 29) to give information on the subject of dividends of the General Paper Company.

As already suggested, the questions whether

dividends were paid by the General Paper Company, and, if so, how, when and in what proportions and amounts, are material for several reasons. In the first place, this subject is one intimately related to the organization of the General Paper Company and the manner and proportions in which the stock is, and has been, held. It therefore bears upon the very nature of the combination and conspiracy. Again, the declaration of dividends is only another fact showing how the business of the combination was carried on, and is admissible in the same way as any other act of the conspirators done by and through the medium of the General Paper Company. Finally, it is unquestionably competent for the Government to go into this matter of dividends, for the purpose of showing that each one of these manufacturing corporations defendant is participating in the profits derived from the sale of the product of all of them.

Smiley v. Kansas, 196 U. S. 447.

7. Refusals to produce the books of the constituent companies, or to give information concerning their contents.

The witnesses Nelson, Bossard and McNair were officers, respectively, of the defendants, Henne-

pin Paper Company, Itasca Paper Company and Northwest Paper Company. They were subpoenaed to produce, among other things, the books of their respective companies showing the amounts, kinds and grades of paper manufactured, and sold through the General Paper Company; the prices, amounts, or credits, received from the General Paper Company for paper sold; and the amounts and proportions of the earnings or profits of the General Paper Company received by their respective companies, either in the form of dividends or otherwise.

The witnesses not only declined to produce the books, but refused to answer preliminary questions designed to show, in a general way, whether or not the books contained information upon the subjects called for.

(See schedule of refusals on this subject by Nelson, Bossard and McNair.)

The call for the books and their contents was limited to the purpose of disclosing such transactions between the constituent manufacturing companies and the General Paper Company, as would obviously throw light upon the existence and character of the alleged combination and conspiracy. Practically all that has been urged above with rereference to the competency and materiality of the

record-book of the General Paper Company, applies to the situation with reference to these books of the constituent companies. Surely, the entries made in the books of the several conspirators, pursuant to and in the regular course of business, transacted while carrying out the conspiracy, must be competent evidence in a case of this kind. These books merely show, from the point of view of the manufacturing company, the same facts which would appear if the books and records of the General Paper Company are made available in the case. One set of books must supplement and corroborate the other. Both of them are competent and material upon the same grounds.

8. Miscellaneous refusals.

Refusals 40 and 41 in the schedule referring to Alexander's testimony relate to questions calling for the number and dates of directors' meetings held in the year 1900. (Tr. of Rec. in Wis. cases, page 288.)

Refusals No. 77 refers to the witness Alexander's refusal to answer an inquiry as to whether there was a meeting of the board of directors in January, 1902 (page 298).

The same witness also refused to answer the following question (Tr. of Rec. in Wis. cases, page 295):

> "Q. Can you in a general way state what the principal product of the defendant mills is, whether it is news print paper or other classes?"

The witness Whiting (Tr. of Rec. in Wis. cases, page 310) declined to state whether, before the final organization of the General Paper Company, the plan of forming a selling company to handle the products of the mills represented by certain gentlemen named by him, had been finally agreed upon.

Along the same line, this witness declined (Tr. of Rec. in Wis. cases, pages 315 and 316) to state whether, prior to the time of the actual subscription to the stock of the General Paper Company, any understanding was reached as to the amount of stock that should be given to each of the subscribers; or whether he had any idea, prior to that time, of the amount of stock he was to receive for his mill.

On page 336 of the transcript of record (Refusal No. 21), the witness Whiting refused to answer the following question:

> "Q. Do you mean to say, Mr. Whiting, that you, as one of the principal men, caused

the General Paper Company to be organized to handle more than ten million dollars of products per year, and that you don't recollect the plan on which it was organized?"

Counsel for the defendants instructed the witness not to answer this question, giving the usual grounds and also the further ground that the question was improper, discourteous, was an affront to the witness and probably intended as such.

He also refused (Refusal 22, page 336) to answer the following question:

"Q. You have no recollection of an understanding between you gentlemen as to the basis of a division of the stock at all?"

Whiting's refusals 6 to 15 (Tr. of Rec. in Wis. cases, pages 327 to 331, inc.) relate to questions calling for the substance of negotiations between the witness and representatives of the defendants Itasca Paper Company and Northwest Paper Company, to induce those companies to come into the General Paper Company.

Refusals 19 and 20 (Tr. of Rec. in Wis. cases, page 335) refer to questions calling for information concerning the renewal of the contract of the General Paper Company with the defendant Petoskey Fibre Paper Company. The witness declined to

state whether the subject was discussed at the directors' meeting held in December, 1904.

Refusal No. 26 (Tr. of Rec. in Wis. cases, page 345) relates to the following question:

> "Q. After the organization of the General Paper Company, did you have any conversation with any of the officers of the International Paper Company about keeping out of this territory west of Chicago?"

Many of the questions above referred to were of a preliminary character, and should certainly have been answered as such. The refusals to answer them clearly indicate the disposition on the part of these witnesses to suppress all the information they can, and further illustrate the determination of the counsel for the General Paper Company to assume the prerogatives of a chancellor at these hearings before the examiner.

II.

THESE WITNESSES CANNOT CLAIM THE PRIVILEGE OF SILENCE EITHER UNDER THE GENERAL PRINCIPLES OF COMMON LAW AND EQUITY JURISPRUDENCE AND PROCEDURE, OR UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

(A) *Under the general principles of common-law and equity jurisprudence and procedure.*

Among the defences urged in the returns to the orders to show cause, is that the "established rule of common-law, as well as of equity, jurisprudence" protects the witnesses against the disclosures sought to be enforced.

It will of course be conceded that in the case of non-judicial officers, or bodies, such as the Interstate Commerce Commission, committees of Congress, the Secretary of the Department of Commerce and Labor, or any other administrative or executive officer or board, the power in question cannot exist except by virtue of a statute specifically conferring it.

In this case, however, the United States Circuit Court stands clothed with all the powers inherent in

a court of equity. A very brief reference to the history of the compulsory production of evidence, both at law and in equity, will demonstrate that the power of the court in this respect is ample.

It is true that under the ancient practice in actions at common-law a party might not compel his opponent to furnish evidence as a witness. His only remedy was by way of a bill of discovery in equity to compel his opponent to disclose facts and documentary evidence material to his case.

Wigmore on Evidence §§ 2217, 2218.

This limitation, however, never existed in equity, and parties could there be freely compelled, either before or after issue joined, to disclose evidence and documents material to the issues. We are of course stating this proposition with the reservation, which will be hereafter discussed, that the testimony or documents would not tend to criminate the party, or subject him to penalties or forfeitures.

Greeleaf on Ev. (15th ed.), Vol. 1, § 361.

Daniels on Ch. Prac. (5th ed.), Vol. 1, p. 885, note 6.

Adams on Equity (7th ed.), p. xxxvi.

Wigmore on Ev. §§ 2218, 2219, pages 3012, 3014-15-16.

The result of the decisions both in England and in this country has been an emphatic declaration of the principle that a party will be compelled to make a disclosure of all facts within his knowledge, or books and documents in his possession, which tend either to establish his opponent's case or to refute the position which he himself takes.

Bustros v. White, Eng. Law Rep. Q. B. Div. 423.

Carver v. Pinto Leite, L. R. 7th Ch. App., p. 90.

Moore v. Craven, L. Rep. 7th Ch. App. cases, p. 95.

Attorney General v. Gaskill, L. R. 20, Ch. Div. p. 520.

Atty. Gen. v. Mayor & Corp. of Newcastle-Upon-Tyne, 1897, 2 Q. B. Div. 384.

Atty. Gen. v. Emerson and another, Law Rep. 10 Q. B. Div. 191.

Arnold v. Pawtuxel Valley Water Co., 18 R. I. 189; 19 L. R. A. 602; 26 Atl. 55.

The power of a court of equity to compel a party to give evidence and produce books and papers material to the issue, cannot at this day be controverted. Indeed, the fundamental characteristic of equity procedure has always been the power and disposi-

tion to act directly upon the parties before the court, rather than upon subject-matter in controversy. The orders and decree of the chancellor were constantly resorted to by parties in actions at law to compel the very thing which the government seeks to accomplish in this proceeding. Modern legislation has made the bill of discovery an unnecessary adjunct even in actions at law. Material evidence may now be required of a party in such actions, without resorting to this cumbersome proceeding.

1 Pomeroy on Eq. Jurisp. (2d ed.), § 193.

Wigmore on Ev., § 2219.

14 and 15 Victoria, Ch. 99, § 6.

Rev. Stat. of Wisconsin 1898, § 4183, as amended by Ch. 244, Laws of 1901.

In 1864 Congress passed the following law, appearing as section 858 of the Revised Statutes:

> "In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in, the issue tried. * * * In all other respects, the laws of the state in which the court is held shall be the rules of the decisions as to the

> competency of the witnesses, in the courts of United States, in trials at common law and in equity and admiralty."

The history of the legislation by which this most salutary reform in procedure was accomplished is fully stated in Wigmore on Evidence, §§2217, 2218 and 2219.

It may safely be said that nowhere in the English-speaking world to-day is a party privileged to refuse the disclosure of material evidence in his possession, either oral or written. The right never existed in equity, and in common-law actions it has been swept away by statute.

In the courts below it was contended also that in equity a privilege existed not to make any discovery which might result in any loss or disadvantage in the nature of a penalty or forfeiture. The argument was that, while the constitutional guaranties applied only in criminal cases, the so-called privilege which existed in equity was not limited to that class of cases, and was therefore virtually an extension of the principle found in the Fifth Amendment.

As this contention cannot well be taken up without discussing at the same time the scope and effect of the amendments, we have deemed it best to deal with it in the next subdivision of the brief.

(B) *The protection of the Fourth and Fifth Amendments cannot be invoked.*

As already noted, each of the appellants has made certain claims of privilege under the Fourth and Fifth Amendments to the Constitution. A brief review of these claims will conduce to an intelligent discussion of the subject.

The individual witnesses plead privileges as follows:

(1) In behalf of the General Paper Company.

(a) That the giving of the evidence will subject the General Paper Company to penalties under the Act of Congress of July 2, 1890;

(b) That the evidence called for would expose the General Paper Company to forfeiture of its charter under the laws of the State of Wisconsin;

(c) That the evidence, if given, would subject the General Paper Company to prosecution for crime, or to penalty or forfeiture, or to something in the nature of a penalty or forfeiture.

(2) In behalf of the witnesses themselves:

(a) That the evidence, if given, would tend to convict them of violations of the Federal laws, contrary to the Fourth and Fifth Amendments;

(b) That the evidence would tend to convict them of violations of the laws of their respective states;

(c) That the evidence would result in subjecting them, as stockholders of the General Paper Company and of other defendant companies, to loss and detriment in the nature of a penalty or forfeiture.

The General Paper Company pleads privileges as follows:

(1) That to compel its officers (the witnesses) to give the evidence called for would amount to requiring the corporation to be a witness against itself, contrary to the provisions of the Fifth Amendment, and, so far as the books and papers called for are concerned, would amount to an unreasonable search and seizure contrary to the provisions of the Fourth Amendment;

(2) That the evidence called for would tend to subject it to forfeiture of its charter, and to other penalties under the laws of the State of Wisconsin.

(3) That the evidence called for would tend to subject it to loss or damage in the nature of a penalty or forfeiture, by tending to disable it from carrying out its contracts with the other twenty-three defendant corporations for the sale of their product.

In the proceeding in Minnesota, the constituent companies of which the witnesses were officers and stockholders also filed answers raising the same issues. (Transcript of Record, Minn. cases, pages 83, 93, 103.)

Before proceeding to examine these claims in detail, we may dismiss without further consideration any claim which the witnesses have made based upon their alleged ownership of stock in the General Paper Company. They are confessedly not the owners of the stock held in their names. In each case the stock so held is the property of the manufacturing corporation defendant with which the record-holder happens to be connected. (Tr. of Rec. in Wis. cases, page 301.)

We shall consider the questions raised by the above claims of privilege under the following heads:

1. The order requiring the appellants to testify and to produce documentary evidence, being made in a suit pending to restrain them from the continuance of a combination and conspiracy in restraint of trade, under the Act of Congress, does not involve an unlawful search and seizure within the meaning of the Fourth Amendment.

2. The guaranty of the Fifth Amendment, that no person shall be compelled in a criminal case to be a witness against himself, is personal to the witness and does not protect corporations.

3. Any privilege which may exist is covered by the immunity statute (32 Stat. at Large, 904; Supp. U. S. Comp. Stat. 1901, p. 367), which is as broad as the constitutional protection. If the Fifth Amendment be held to extend to corporations, the immunity statute must be likewise extended.

1. *The order requiring the appellants to testify and to produce documentary evidence, being made in a suit pending to restrain them from the continuance of a combination and conspiracy in restraint of trade, under the Act of Congress, does not involve an unlawful search and seizure within the meaning of the Fourth Amendment.*

An elaborate discussion of the origin and development of the Fourth Amendment is no longer necessary. It is sufficient to say that in England the incorporation of the principle into the unwritten constitution followed from those abuses of executive authority whereby agents of the Crown were sent into the houses of private citizens to make general searches for evidence of political offenses committed or designed. At the time of the Revolution, these abusive practices were fresh in the minds of the colonists, who drew their inspiration from those principles of English law which had been established for the protection of the citizen against just such oppression. This form of tyranny had been indelibly impressed upon the minds of the inhabitants of this country by the practice of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods.

Boyd v. United States, 116 U. S. 625;
Cooley on Constitutional Limitations, 6th Ed. pg. 364.

It requires but a very brief reference to the origin and growth of this principle, finally adopted as an amendment to our constitution, to show that it has no proper application to the present situation. The principle never was intended, and never has been applied, to prevent the production of books and documents material and relevant to a cause, unless such production would tend to criminate the witness. It would seem that it has always been the practice for courts of equity to compel a party to testify and to produce books and documents material to the issues in a pending cause. The practice was well established at the time of the adoption of the constitution; and no principle is better established than that proceedings well known to the courts and in general use at the time the constitution was adopted, will not be considered to fall within the inhibitions therein contained.

Murray's Lessee, et al., v. Hoboken Land & Improvement Co., 18 How. 272.

To issue a general warrant to search one's house and papers without the justification of a pending cause thereby to be subserved, is one thing; to issue a *subpoena duces tecum* to compel the production

of material documentary evidence to substantiate an issue in a pending suit, is quite a different thing. The practice of issuing subpoenas is fully as ancient as that of issuing search warrants. The latter were regarded as grievances; the former never were. The constitutional provision is that "no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." It seems safe to say that the Fourth Amendment was intended simply to prevent general searches and seizures, and that it is an unwarranted extension of the principle to invoke it to prevent the production of books and documents particularly designated, in the possession of the opposite party to a suit. The only decision which we have been able to find applying the amendment to the case of a subpoena is the decision of Judge Wallace in the case of *In Re Hale,* United States Circuit Court, Southern District of New York, not reported. The case is now pending in this court for review. Judge Wallace there said that a general subpoena to produce before a grand jury all of the books, papers, letters and contracts of a certain corporation extending over a term of years, was an unlawful search and seizure within the meaning of the Fourth Amendment. The distinction between that situation

and the one here is obvious. In this case we not only have a pending suit with issues framed, but every book and document called for is described with particularity and its materiality pointed out. In most cases the books and papers were actually produced in court. Attention is directed to the following language of Judge Wallace:

> "If the petitioner had been ordered to produce a single document or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable and such as the courts are daily making. Such was the case of *Interstate Commerce Commission v. Baird,* 194 U. S. 25, where the observation was made by the court upon which the Government relies."

The case of *Boyd v. United States* was a proceeding under the revenue laws, on information filed by the District Attorney for the seizure and forfeiture of thirty-five cases of plate glass seized by the collector. The statute provided that any owner, importer or consignee who should, with intent to defraud the revenue, attempt to make an entry of imported merchandise by means of fraudulent in-

voices, etc., or who should be guilty of any wilful act or omission whereby by the United States should be deprived of its lawful duties or any portion thereof, should

> "for each offense, be fined in any sum not exing five thousand dollars nor less than fifty ceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, and, in addition to such fine, such merchandise shall be forfeited."

The statute also required the owner, on motion of the district attorney,

> "to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be deemed as confessed."

It was held that the statute was unconstitutional, as applied to suits for the forfeiture of goods, being repugnant to the Fourth and Fifth Amendments. The gist of the case was that the provision for taking the statements of the district attorney's affidavit as true, in the case of non-production, was tantamount to compelling the production of all books and papers which might tend to criminate the owner and subject his property to forfeiture in a proceeding criminal in its nature. The court considered the cases in

which seizure of a man's goods under writs and process was permitted, and distinguished them as follows:

> "And in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, **and is no more than what the court of chancery would direct on a bill for discovery.* Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers, to make him liable for a penalty or to forfeit his property." (Page 624 of opinion.)

So far as the production of evidence against one's self is concerned, it is difficult to see wherein the Fourth Amendment adds anything to the protection of a witness which is not fully covered by the Fifth Amendment; for, manifestly, there can be no distinction in principle between the giving of oral testimony, and the production of books and papers which might tend to incriminate. Logically consid-

*Italics are ours.

ered, it seems to us that the concurring opinion of Mr. Justice Miller and Chief Justice Waite states the true theory of the application of these amendments. However this may be, it may be conceded for the purposes of our argument that the seizure of a person's private papers, to be used as evidence against him in a criminal case, might not only fall within the inhibition of the Fifth Amendment, but also be an unreasonable search and seizure within the Fourth Amendment. What the court held in the *Boyd* case was virtually that the district attorney, under the provision for taking his statements as true in case of non-production, was in a position to compel production of papers generally, and that the owner of the goods was therefore bound to produce his papers or suffer a forfeiture of his goods. It was evident that the proceeding had all the objections of a general warrant to search one's papers and premises. The law providing that the affidavit of the district attorney as to what all of a man's books, papers and invoices would tend to show, should be taken as true unless the papers were produced, has in effect all of the vicious elements of a general warrant to seize and search all of the papers. On this point the court said:

"But, in regard to the Fourth Amendment,

it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigaton of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself."

(Page 621 of Opinion.)

As Judge Wallace said in the *Hale* case, it still

remains true that neither the Fourth nor the Fifth Amendment would be violated by the production of books and papers material to the issues of a cause regularly pending in a court of justice, where the party is fully protected against prosecution for crime or against the enforcement of penalties or forfeitures on account of any matter in relation to which he may thus testify or produce evidence. Granting that a general *subpoena duces tecum* to produce all of a person's papers to be examined by the grand jury or prosecuting attorney for the purpose of finding, if possible, some evidences of crime, where the person may be prosecuted and subjected to punishment if found guilty, comes squarely within the inhibition of the Fourth and Fifth Amendments; yet the principle can have no application where particular books and papers, sufficiently described to enable the witness to identify and separate them from the general mass of papers, and to enable the court to see their probable materiality, are required to be produced in a pending suit, and the witness is protected by statute from any prosecution on account of the matters involved. The one, although disguised under a different form, to be sure, from a general search warrant, which has received the condemnation of law, is in reality an unlawful search and

seizure of papers for the purpose of finding evidence to convict of a crime; the other is a well established judicial proceeding, carried out with a view to the full protection of the witness, to enable the court to arrive at a conclusion on the facts at issue. Modern jurisprudence has always condemned the one and approved the other. One protects the sanctity of the home and the personal liberty of the citizen; the other enables the Government to punish crime and in proper proceedings to prevent the violation of law.

The case of *Adams v. New York*, 192 U. S. 585, has an important bearing upon the meaning of the Fourth and Fifth Amendments. There, papers were seized by virtue of an illegal search warrant in the course of a search for gambling devices. The court held that the evidence thus procured might be admitted on the trial of the person accused of the crime of having in his possession gambling paraphernalia. Clearly, if the Fourth Amendment was intended to prohibit a court from compelling a defendant to furnish evidence in any cause simply for the reason that the papers are private, the evidence in the *Adams* case would not have been admitted, for if the compulsory production of material evidence derived from

the defendant's private books and papers is regarded as an unreasonable search and seizure, then the evidence there considered would have been inadmissible within the rule laid down in the *Boyd* case. The decision in *Adams v. New York* is a recognition of the principle that the amendment was never conceived to have any such force. The court said (page 598):

> "We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen, or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect. * * *
>
> Evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that such warrant was illegally issued."

In *Interstate Commerce Commission v. Brimson, supra,* this court held that Congress might create an administrative body, and authorize it to summon witnesses, and require the production of books, documents and papers relating to the subject-matter. The special authorization in regard to calling witnesses and the production of books and papers was obviously necessary, because the Commission was not a court and could have no inherent powers as a court of equity. The act of Congress further conferred upon the United States courts jurisdiction, at the suit of the Commission, to compel witnesses to appear before the Commission and to testify and produce documentary evidence. The facts in the case were these: A complaint had been made to the Commission that the Illinois Steel Company, a manufacturing corporation, had caused to be incorporated certain railroad companies owning certain switching lines, and that the Illinois Steel Company operated them in connection with other railroads engaged in interstate commerce, for the purpose of evading the law and obtaining illegal,unjust and unreasonable rates on its products. Certain officers of the railway companies and the Steel Company were subpoenaed by *subpoenas duces tecum,* addressed to them as officers of the said companies respectively, requiring

them to produce the stock-books of their respective companies. They refused to answer any questions as to the ownership of the stock, or to produce the books. The Commission made an application to the court to compel the giving of their testimony and the production of the books. The court dismissed the bill. In this court it was contended that the twelfth section of the Interstate Commerce Act was in violation of the fundamental guaranties of personal rights recognized by the Constitution as inhering in the freedom of the citizen. It will be noted that this is the provision authorizing the Commission to investigate the business of common carriers engaged in interstate commerce, and authorizing the court to enforce the attendance of witnesses and the production of documentary evidence. The court held that this privilege had not been claimed before the court below, and said that, had it been raised and determined in favor of the witnesses, the proceedings could have been dismissed upon the merits. The court however, then proceeded to state that since the decision of the case in the court below, Congress had amended the immunity statute considered in *Counselman v. Hitchcock,* by an act approved February 11th, 1893, being the immunity statute now in existence, and which was considered in *Brown v. Walker,* and

Interstate Commerce Commission v. Baird, plainly intimating that under that act the witness would have been compelled to produce books. If this was an unlawful search and seizure, no act of Congress requiring the production would have made it legal. It was entirely unnecesary for the witness to claim his personal privilege under the Fourth Amendment; the proceedings would have been void and the claim could have been made in any court.

Can it be possible that the court has authority to compel the appearance of a witness before the Interstate Commerce Commission, or before the Secretary of Commerce and Labor and the production of his books and documents as evidence in an investigation into a conspiracy in restraint of trade, and yet has no inherent power to compel the same production before an examiner taking testimony in a cause after it has been brought by the government to restrain a violation of the Sherman Law? Are courts of equity potent to aid executive and administrative bodies,and impotent to enforce the act of Congress in direct judicial proceedings brought by the Government to restrain parties from violating it? The truth is that all of these statutes, including those removing the disabilities of parties as witnesses, and the laws of the states abolishing the cumbersome practice of

bills of discovery, are evidence of a progressive and enlightened policy in the administration of justice.

Interstate Commerce Commission v. Baird, supra, is another very important case. There, the court required the officers of the defendant railroad companies to produce certain contracts between their companies and various coal companies in which the railroads were largely interested. The case in its origin was a proceeding before the Interstate Commerce Commission upon a specific complaint charging the railroad companies defendant with unreasonable discriminations in carrying coal. Among the contentions made in behalf of the Commission was the one that the Commission's broad powers of investigation on its own motion were sufficient to cover the case, but the court held that the proceeding before it was not an investigation conducted by the Commission under its general powers under section twelve of the Interstate Commerce Act, but was a proceeding under a specific complaint. The court said (Pages 40 and 41):

> "But in the present case, whatever may be the right of the commission to carry on an investigation under the general powers conferred by section 12, this proceeding was

> under the complaint filed, and we will examine the testimony offered with a view to its competency under the allegations made by the complainant."

For the purposes of this argument, nevertheless, we may waive any such question and assume that the statute requiring the attendance of witnesses and the production of documents applied with all its force to this trial upon a specific complaint in the same manner that it would apply to general investigations by the Commission upon its own motion.

The defendants contended not only that the papers called for were immaterial, but that the evidence, if adduced, would tend to subject them to forfeiture of estate in violation of the Fifth Amendment, and to unreasonable searches and seizures in violation of the Fourth Amendment. The argument advanced and the answer thereto appear in the following extract from the opinion (page 44 *et seq.*):

> "It is contended in the answers filed in the Circuit Court that to require the production of these contracts would be to compel the witnesses to furnish evidence against themselves which might result in forfeiture of estate in violation of the Fifth Amendment to

the constitution; would subject the parties to unreasonable searches and seizures of their papers contrary to the Fourth Amendment, and would require them to produce papers pertaining wholly to intra affairs in violation of the reserved rights of the people of the states, and beyond the power of the commission, whose duties are limited to investigations pertaining to interstate commerce.

"At the hearing the constitutional objections do not seem to have been relied upon; those argued pertained to the relevancy of the proof and the rights of persons not before the court to be protected from the publication of their private contracts. As to the constitutional objection based upon the Fifth Amendment, the act as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. The full consideration of the subject and the decision of this court in *Brown v. Walker,* 161 U. S. 591, renders further consideration of this objection unnecessary.

"The origin and interpretation of the Fourth Amendment to the constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd v. United States,* 116 U. S. 616. In that opinion the learned Justice points out the analogy between the Fourth and Fifth Amendments, and the object of both to protect a citizen from compulsory testimony against himself, which may result in his punishment, or the forfeiture of his estate, or the seizure of his papers by force or their compulsory production by process for the like purpose. In the course of the opinion it is said: 'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers, to be used as evidence to convict himself or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.' And see *Adams v. People of State of New York,* 192 U. S. 585, decided at this term.

"As we have seen, the statute protects the

witness from such use of the testimony given as will result in his punishment for crime or for forfeiture of his estate. **Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure.* Indeed, the parties seem to have made little objection to the inspection of the papers; the contest was over their relevancy as testimony. Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly. the courts should protect non-litigants from unnecessary exposure of their business affairs and papers. But it certainly can be no valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it."

On this subject of the applicability of the Fourth Amendment, the *Baird* case is conclusive. The contracts there were private contracts, between the railroad companies and outside corporations. They pertained primarily to the sale of coal, and it was a serious question whether they were material to the

*Italics are ours.

issues in the case. They certainly disclosed the private business of the defendant with outside parties. They would tend to convict them of violations of law. These matters were all considered. From the point of view of the constitutional objections, it made no difference whether the testimony was called for under the provisions of the Interstate Commerce Act or not. If the production of the books and documents was in violation of the constitutional rights of the defendants, then Congress could not confer the power. Constitutional protection is as much against legislative as against executive or judicial action.

If it was not an unlawful search or seizure to compel a witness in that case to produce the coal contracts belonging to the railroad company, it was not an unlawful search or seizure to compel the witnesses here to produce the record book of the defendant General Paper Company, showing the action of its board of directors, composed of representatives of each of the other twenty-three defendant corporations, and to compel them to produce contracts and books showing the control of the General Paper Company over interstate commerce, and its monopoly of

the trade in paper products, together with the equalization of prices and the division of profits among the participating defendants. The books and papers here involved necessarily relate to the charges which the Government is seeking to substantiate. For the most part, they are the records of the very contracts which it is contended constitute a violation of the Anti-Trust Law. Moreover, every book and paper called for was specifically identified. The defendants and the witnesses have never made any claim that the demands of the Government in this respect are in any way vague or uncertain. They not only knew what books and papers were desired, but had them in court before the examiner.

This discussion necessarily leads to a consideration of the claims made under the Fifth Amendment; in fact, the two subjects are so closely interwoven that we are compelled, to a greater or less extent, to consider them together.

2. *The guaranty of the Fifth Amendment, that no person shall be compelled in a criminal case to be a witness against himself, is personal to the witness, and does not protect corporations.*

Upon the threshold of this branch of the inquiry we are met with the suggestion that these witnesses are but officers of the defendant General Paper Company and certain other defendants, and that their evidence, if given, will tend to subject those corporations to punishment under the Sherman Law, and to forfeiture of their corporate charters under the laws of the states of Wisconsin and Minnesota. It is further urged that the witnesses themselves will, on account of their connection with the corporations, suffer pecuniary loss through the forfeiture of the charter of the General Paper Company, and through the practical abrogation of the contracts between that company and the constituent concerns. This position necessitates an examination of the precise scope of the constitutional privilege.

We submit that the constitutional guaranty has no application to corporations; that the privilege is personal to the witness; that pecuniary loss or disadvantage furnishes no justification for a refusal

to answer; and that, so far as criminal prosecution is concerned, the witness is amply protected by the Immunity Statute. If, in the course of the discussion of these propositions, we feel called upon to state at some length, principles long since established by the authorities, it will be understood that our excuse is the strenuous insistence of the appellants and plaintiffs in error that they are protected by these constitutional provisions.

The Fourth and Fifth Amendments were, in the main, intended to protect the personal rights of the citizen. There are to be sure, certain provisions such as the inhibition against taking property without due process of law, or for public use without just compensation, which were obviously designed to protect property, and as such they undoubtedly furnish protection for the property of corporations as well as of individuals. Nevertheless, it is hard to believe, when we consider the history and interpretation of the constitution, that the clause, "no person shall be compelled in any criminal case to be a witness against himself," was ever intended or ought to be construed to protect corporations. The history of the principle here crystallized into a constitutional guaranty is too well known to require extended dis-

cussion. We need only refer to the abuses of the inquisition in Continental Europe, followed to some extent in ecclesiastical and star chamber trials in England. Certain harsh practices in this regard gradually crept into common law procedure, until finally the reform agitation, begun in the seventeenth century, resulted in the abolition in England of all inquisitorial methods. To compel a person to give evidence exposing him to criminal prosecution savored too much of the inquisition. It was realized that such arbitrary exercise of judicial power had a dangerous tendency toward browbeating, bullying and the use of physical force and torture. The framers of the Fifth Amendment to our Constitution simply formulated the rule of judicial action thus established.

We venture to say that in no historical recital or judicial utterance has this provision for the protection of the liberty of the citizen ever been expanded to include a corporate entity.

A clear distinction has been taken between constitutional provisions obviously designed for the protection of property howsoever held, and provisions intended on their face to protect personal rights. In the latter case, where the language deals solely with the subject of personal rights of the citizen, it

is an unwarrantable extension of its scope to include corporations within its operation.

We quote from the opinion of Mr. Justice Field, in the *Railroad Tax Cases,* 13 Federal, p. 746 of opinion:

> "From the nature of the prohibition in this amendment, it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves, and therefore it might be said with much force that the word persons there used, in connection with the prohibition against the deprivation of life, liberty and property, without due process of law, is in like manner limited to the natural person."

The distinguished jurist then proceeded to demonstrate that the clause relating to the deprivation of property without due process of law, protects the property of corporations. It seems however to have been conceded by him, that corporations do not fall within the scope of the clause providing that no person shall be compelled to be a witness against himself. What we have just said on this question

applies with equal force to the Fourth Amendment.

We now proceed to a discussion of some of the authorities:

In *Counselman v. Hitchcock,* 142 U. S. 547, it will be remembered that Counselman was subpoenaed before the grand jury and asked to disclose his business with the various railroads over which he shipped grain. He was specifically asked about the receipt of rebates from the railroad company, and refused to answer on the ground that his answers might tend to criminate him. The court held that the law as it then stood, was not broad enough to protect him against criminal prosecution on account of anything he might disclose. In the absence of such an immunity statute, therefore, the court decided that he was not obliged to testify. We mention this case simply to trace the history of this legislation extending immunity to witnesses.

After the *Counselman* case, Congress changed the law, and provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise."

In *Brown v. Walker,* 161 U. S. 591, the petitioner

Brown, the auditor of the Allegheny Valley Railway Company, was subpoenaed to appear before the grand jury and give testimony concerning the affairs of the company. Among other things he was asked to state the rebates or commissions paid, to whom paid, the dates of the same, and on what shipment, and to state fully all particulars within his knowledge relating to such transactions. Admittedly he obtained all that knowledge as the auditor of the corporation. The court said (page 610 of opinion):

> "If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analagous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provisions in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer

and that the judgment of the court below must be affirmed."

It will be observed that there appeared to be no question in the mind of the court that the privilege was personal to the witness, and that the immunity in terms extending to him, took away that privilege. The fact that he was an officer of a corporation which might be damaged and subjected to criminal prosecution on account of the evidence given, was of no consequence.

As we have seen, in the *Brimson* case, the court held that an officer of a corporation might be compelled to produce documents before the Commission, and that the court would enforce the mandate of the Commission in that regard.

The question we are discussing was squarely passed upon in the recent case of *Interstate Commerce Commission v. Baird,* 194 U. S. 25. There, in the course of a hearing before the Interstate Commerce Commission, Baird, an officer of one of the defendant railway companies, was asked to produce certain contracts between those companies and various coal companies for the purchase of coal. To the petition filed in the United States Circuit Court to compel the production of the papers and documents

in question, answers were interposed, in substance setting forth the

> "right of the defendants to refuse the production of the papers and documents and to decline to answer the questions because the same did not relate to any subject which the commission had the right to investigate and the contracts relate to the private business of persons not parties to the proceedings before the commission; that the witnesses are protected in their right to refuse to produce the contracts or answer the questions by the Fourth, Fifth and Tenth Amendments to the Constition of the United States; that the contracts were not relevant to the subject matter of investigation before the commission."

The court said (page 45, *et seq.* of opinion):

> "As to the constitutional objection based upon the Fifth Amendment, the act as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance to the requirements of the law. The full consideration of the subject and the decision of this court in *Brown v. Walker,* 161 U. S. 591,

renders further consideration of this objection unnecessary. * * *

"As we have seen, the statute protects the witness from such use of the testimony given, as will result in his punishment for crime, or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure. Indeed, the parties seem to have made little objection to the inspection of the papers; the contest was over their relevancy as testimony. Nor can we see force in the suggestion that these contracts were made with persons not parties to the proceeding. Undoubtedly the courts should protect non-litigants from unnecessary exposure of their business affairs and papers, but it certainly can be no valid objection to the admission of testimony otherwise relevant and competent that a third person is interested in it. * * *

"To unreasonably hamper the commission by narrowing its field of inquiry beyond the requirements of due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress."

At the time this case was decided, the corporations concerned were subject to the penalties under the Interstate Commerce Act as amended March 2, 1903 (32 Stat. at L. 943). The documents were the documents of the corporation. They were desired simply to prove the violation of the law by the corporation, and to subject it to penalties in the form of criminal prosecution. Manifestly, the court assumed as beyond dispute that the guaranty against self-incriminating testimony had no application to corporations.

It seems hardly necessary to argue the proposition that a privilege of the character claimed is personal to the witness. The authorities are numerous and uniform to this effect.

Brown v. Walker, 161 U. S. 597, and cases cited.

Morgan v. Halberstadt, 60 Fed. 592.

Werthein v. Cont. Ry. & Trust Co., 21 Blatchford, 246.

N. Y. Life Ins. Co. v. People, 195 Ill. 430.

In Re Peasley, 44 Fed. 271.

U. S. Express Co. v. Henderson, 69 Iowa, 40; 28 N. W. Rep. 426.

Gibbons v. Company, 5 Price, 491.

State v. Jack, 69 Kans. 387; 76 Pacific, 911.

This court, in *Brown v. Walker, supra*, held that the privileges were for the protection of the witness alone, and not for that of other parties, and that consequently he could waive it at his pleasure. A party has no control over a witness in this respect, cannot make the claim of privilege for him, and has no ground for complaint that the privilege is erroneously held inapplicable and the answer compelled.

Wigmore on Ev. Vol. 3, § 2270.

Commonwealth v. Shaw, 4 Cushing, 594.

Commonwealth v. Howe, 13 Gray, 26.

State v. Pancoast, 5 N. Dak. 516; 67 N. W. 1052.

The witness either has a personal privilege or he has none. If he has one, it is clear under the decisions he may waive it and testify to any incriminating facts, although they may also tend to incriminate a corporation with which he is connected, or others parties. It cannot be that merely because the witness is an officer of one or more of the defendant corporations, he may not waive his privilege and testify to the facts. If this were so, then the corporation affected would be entitled to an injunction or some other equitable remedy to close his mouth. The very statement of the idea is a demonstration of its absurdity.

But it is claimed in this case that the witness obtained his knowledge solely by reason of the fact that he was an officer of the defendant corporation, and that the papers and books to be produced are the papers and books of the corporation, and therefore that to cause the forcible production of the books and papers of the corporation is to compel it to testify against itself. Let us analyze this argument. In the first place, have the courts ever made a distinction between knowledge which the witness obtained in his own business, and that acquired in the business of other people, and have the courts ever made any distinction between cases in which the papers to be produced were the papers of the witness, and cases where they were the papers of a corporation in his possession as an officer? It is said that a corporate entity can only act through its officers, and that therefore it is in a different position from a partnership, unincorporated association, or individuals. Let us state a case: suppose that a witness is the manager of a large business, firm or unincorporated association; would it be claimed that the knowledge which he obtained as such manager, was privileged, not because it would incriminate the witness, but because it would incriminate his employer? Certainly not. Is a corporation any more entitled to the protec-

tion of the law than any other employer, than a copartnership, an association, a blood relation, a neighbor, or a friend? But, say the appellants and plaintiffs in error, the business of corporations of necessity must be done through officers. We say the business of large firms and of individuals engaged in great commercial transactions to-day must of necessity be done through managers, employees and servants, and therefore that a corporation is no more to be protected than any other employer. It seems to us that the decisions of this court, which we have cited and those which we shall hereafter cite, conclusively settle this question. To be sure, the question was not specifically considered by this court in those cases, but in the *Brimson* case the witness was required to produce the documents of a corporation and testify to facts within his knowledge solely as an officer. In *Brown v. Walker, supra,* the witness was required to testify to facts solely within his knowledge, as an officer of the Allegheny Valley Railway Co., and the court considered the question whether the privilege was personal to the witness and might be waived. In the *Baird* case, 194 U. S. 25, this question was necessarily involved, the witness, as we have seen, having been required to testify to facts the knowledge of which he obtained as an officer of the de-

fendant railway company, and to produce documents belonging to the railway company. The court reaffirmed *Brown v. Walker,* and held that the witness was protected by the immunity statute and must produce the documents. It will be said that the court did not pass upon this question. Our answer is that it must of necessity nave been passed upon. It seems strange that if the objection was tenable the distinguished counsel and the court in that case entirely overlooked it. It is significant that in all the line of decisions construing this most important amendment, enacted for the liberty and protection of the citizen, no federal court has ever construed its provisions to protect the corporate entity, or allowed a witness to set up the privilege of such corporation. We are not, however, without direct authority upon this proposition. We have noted the language of Justice Field in the *Railroad Tax Cases,* 13 Fed. 746, and we now invite the court's attention to the following cases:

The case of *Morgan v. Halberstadt, supra,* furnishes a striking illustration of the point we are making. In a libel suit against a newspaper, one Jones, being called to testify, announced that he was a share-holder in the New York Times Association, and also its treasurer. He claimed a

privilege against answering for the reason that it would tend to prove the publication of a libel by the newspaper. The defendant's counsel asked the court to instruct the witness that if the question would tend to criminate him, he might refuse to answer. The court said p (596-7):

> "It is a sufficient answer to the contention of plaintiff in error to refer to the well settled principle that such privilege belongs exclusively to the witness. The party to the suit has no right to insist upon it, except when he is himself the witness. And if the witness waives his privilege, or the court disregards it, and requires him to answer, the party has no right to interfere or complain of the error. *Cloyes v Thayer,* 3 Hill, 564; *Southard v. Rexford,* 6 Cow. 255; *Ward v. People,* 6 Hill, 144; *People v. Carroll,* 3 Parker, Cr. R. 73."

New York Life Insurance Co. v. People, supra, involved a proceeding brought by the State against the company to recover a penalty imposed for discrimination in rates between parties insured. The statute provided a penalty of not less than five hundred nor more than one thousand dollars, to be sued for and recovered in the name of the people of the State of Illinois by the state's attorney in the county

in which the offense was committed, one-half to be paid into the county treasury and the other half to go to the informant. The agent of the Insurance Company was required to testify to the discrimination over his objection that the evidence called for would tend to criminate the company. The court said (p 432):

> "It is insisted that the trial court erred in requiring the agent to testify, over the appellant's objection, to the facts showing the rebate and discrimination prohibited by the statute and for which the penalty is imposed. It is said that the agent was thereby compelled to criminate himself. If the privilege invoked be applicable to such a case it is a personal one, and inasmuch as the witness did not himself claim the privilege the company cannot do so, and it is the only appellant here."

In *State v. Jack, supra,* a proceeding was instituted to investigate before the court the existence of a combination of coal operators in violation of the Anti-Trust Law of the State of Kansas. The witness objected to answering on the ground that the testimony would tend to convict him of a crime and subject him to penalties and forfeitures. Upon the argument it was contended also that the corporation

would be subjected to forfeiture of its charter, rights and franchises. It was further urged that the witness was a stockholder in the corporation. The court said:

> "The constitutional provision was intended for the protection of the witness. The hurt must be his own. He must himself be included in the terms of the law before he has just grounds for complaint."

This case has recently been affirmed by this court.

In *United States Express Co. v. Henderson, supra,* the same question was raised, where an employee of a corporation refused to produce the books upon the ground, among others, that they would incriminate his employers. The Supreme Court of Iowa said:

> "We think that the court was right in adjudging Frazier to be in contempt. The only question raised is as to whether it was the privilege of the witness to refuse to produce the books under the section of the Code above cited. * * *
>
> If it had been claimed that the books called for tended to render the witness criminally

liable, it may be that he could not properly be required to produce them. But the claim is simply that they tended to render the witness' employers criminally liable. The case, it seems to us, is not different from any other where a witness is asked to produce a book or paper of his employer. If the book or paper is not within his control, that, of course, would be sufficient reason for not producing it. But the refusal in this case is not based upon that ground. It is based upon the identity of the witness with his employers. But the fact the employers had taken on a corporate character did not identify with themselves an employe to any greater extent than any employe is identified with his employer."

Gibbons v. The Company, supra, was a bill filed by the plaintiff for discovery. One of the defendants demurred upon the ground that his answer would tend to incriminate a corporation defendant which was his employer. The demurrer was dismissed, the court saying:

"I never knew an instance of a clerk demurring to a bill of this sort. * * * I have no difficulty in saying that the demurrer cannot be maintained, for it is clear that the clerk and the defendants cannot demur on

the ground that his principals are liable to penalties and his answer could not be read against them."

A very brief notice of the cases cited by the appellants and plaintiffs in error upon this question will be sufficient.

The case of *Bank of Oldtown v. Houlton,* 21 Maine, 502, seems to us to have no bearing whatever upon this question. The principle enunciated there was simply that a stockholder and officer of a bank was the real party in interest and could not be compelled to testify in an action at law. The court merely applied the old principle that a party in an action at law (the action being one of assumpsit) could not be compelled to be a witness, in fact, was not competent as a witness. There was no question involved under the Constitution.

The case of *State v. Simmons Hardware Co.,* 15 L. R. A. 675; 109 Mo. 118, perhaps comes a little nearer the question. In that case, however, it will be noted that there was no immunity statute protecting the witness, and that he might be subjected to criminal prosecution, fine and penalty. What was said as to the corporation does not seem to have been either necessary to the decision or of any particular importance.

The case of *Davis v. Lincoln Nat. Bank*, 4 N. Y. Supp. 373, the court below said had no bearing whatever upon this question, and it seems to us that the only question involved was the production of certain books and papers under the Code provision of the state of New York. The constitutional protection does not seem to have been mentioned, and as far as we have been able to discover, this case never has been cited or approved. In fact, in the decision of Judges Lacombe and Wallace, in the case of *Morgan v. Halberstadt*, 60 Fed. 592, this case was not cited or considered, and the court held to the contrary.

3. *Any privilege which may exist is covered by the immunity statute (32 Stat. at L. 904, Supp. U. S. Comp. Stat. 1901, p. 367), which is as broad as the constitutional protection. If the Fifth Amendment is held to extend to corporations, the immunity statute must be likewise extended.*

Assuming for the purposes of this argument that we are wrong in our contention, and that the Fifth Amendment to the Constitution protects corporations as well as individuals, then it is evident that the immunity statute should also be construed to protect corporations as well as individuals from prosecution; and in what we submit under this head, we desire it to be understood that we are here proceeding upon the assumption that the court may come to the conclusion that corporations are so protected.

The immunity statute which we refer to (32 Stat. 904) provides as follows:

> "That no person shall be prosecuted, or be subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts; provided further, that no person so tes-

tifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The language here employed is the same as that found in the section of the Interstate Commerce Act, exempting from prosecution witnesses who are required to produce evidence, documentary or otherwise, before the Commission. That act reads as follows:

> "*Be it enacted, &c.,* That no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to

a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena or the subpoena of either of them, or in any case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." Compiled Statutes 1901, page 3173; 27 Statutes, 443.

Counsel for the appellants undertook in the court below to make some distinction between the effect of the Immunity Statute under the Anti-trust Law, and the immunity provision of the Interstate Commerce Act, on the ground that the former statute contains no clause in terms requiring a party to produce documents and papers. The obvious reason for this ommission in the Anti-Trust Act is that the anti-trust laws are enforced entirely in the courts, and the courts inherently have the power to compel the production of books and documents and the testimony of witnesses, which power it was necessary for Congress to confer upon a non-judicial body like

the Interstate Commerce Commission. *Interstate Commerce Comm. v. Brimson, supra.*

It is not a fair argument to say that, because this statute does not require a witness to appear before the court or an examiner and testify, or prescribe that he shall not be excused from testifying on the ground that the testimony will tend to incriminate him, it is robbed of its effectiveness as an immunity statute, or differentiated from the immunity statute in question. In the first place, courts need no substantive statute conferring this power, but only an immunity conferred upon the witness in order that the court may exercise its undoubted authority; and, second, the command to appear and testify is valueless without the immunity statute. Suppose Congress had provided that witnesses should be compelled to appear before the Interstate Commerce Commission and produce documents and papers, and testify, and that they should not be excused from testifying on the ground that the information would tend to convict them of a crime, but had not provided an immunity. Would the statute have been constitutional? Certainly not.

It is worthy of note that there is a similar provision requiring witnesses to appear and testify before the Department of Commerce and Labor.

(Supp. to Comp. Stat. 1903, p. 45.) This provision makes applicable all the provisions of the Interstate Commerce Act, on the subject of immunity, and requires the attendance of witnesses, and the production of documents, before the Commissioner of Corporations. See also, statutes providing for the appearance of witnesses before investigating committees of Congress. (*In Re Chapman,* 166 U. S. 661.)

The substantive part of the immunity statute in this case is identical with that of the Interstate Commerce Act. It provides that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter or thing concerning which the witness may testify or produce evidence, documentary or otherwise. Speaking of the immunity statutes passed in aid of the enforcement of the Anti-Trust Law and the Interstate Commerce Law, it is to be said that they were both enacted under the same power conferred by the Constitution upon Congress, namely, the power to regulate commerce between the states and with foreign nations. They both belong to a series of acts of Congress which have in view the same general object; one, particularly to regulate persons and corporations, principally railroads, engaged in interstate

commerce, and to enable the shipper to obtain redress for discriminations and excessive rates; the other, equally applying to railroads, and intended to regulate corporations and persons engaged in other branches of interstate commerce, and to enable individuals to obtain redress for injuries on account of monopolies and contracts in restraint of trade. This being so, the construction of the immunity statute, intended to accomplish the same object, must be the same in both cases. No possible distinction can be made between the immunity clause in the Anti-Trust Act and the immunity clause in the Interstate Commerce Act.

For the purposes of this branch of the argument, we shall assume that the Fifth Amendment applies to corporations, for if the word "person" in that amendment can be said to include a corporate entity, then by a parity of reasoning, the word "person" in the Immunity Statute should be given the same construction. The latter being a remedial statute, the presumption must be that it was intended to be as broad as the provision of the Constitution which it was designed to cover, and should therefore be given the same construction.

People v. Butler St. Fdy. Co., 201 Ill. 255.
State v. Jack, 76 Pacific, 915;

Interstate Commerce Comm. v. Baird, 194 U. S. 36 and 37.

In *Brown v. Walker,* this court said (p. 596):

> "It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose, not necessarily to protect witness against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislature power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid unless, as was observed by Mr. Justice Marshall in *Fletcher v. Peck,* 6 Cranch, 87, 128. the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In the *Baird* case the court also said, speaking

of the amended clause in the Anti-Trust Act (p. 37):

> "The provision in the statute under consideration, being intended to enlarge, rather than limit, the application of previous terms, should not receive so narrow a construction as to defeat its purpose."

The appellants and plaintiffs in error claimed in the courts below that the Constitution should have a liberal construction, to include not only penalties and forfeitures, but anything in the nature of a penalty or forfeiture, and, as the immunity statute excepts certain classes of persons from prosecutions, should have a strict construction. Consequently, it was argued the Constitution includes certain penalties and forfeitures, or pecuniary losses in the nature of forfeitures, which are not protected by the immunity statute. We shall have occasion to consider what penalties and forfeitures are within the meaning of the Fifth Amendment, but, for the purpose of this argument, we are contending that the opposite construction should be given to this immunity statute. It was manifestly intended to enable the court either in public prosecutions or in civil actions for the prevention of monopolies, or for the redress of grievances by private individuals, to com-

pel witnesses to testify in any case where, in the absence of the statute, they would have been protected by the Fifth Amendment. This obvious intention of the statute is strengthened by a consideration of the objects to be attained, and by a brief consideration of the history of this law. It is well known that the Interstate Commerce Law was passed principally to regulate railway corporations in carrying on interstate commerce, and to enable the United States by prosecutions to prevent violations of the act, and private individuals to insure redress for their grievances.

In the *Counselman* case it was held that the Immunity Statute was not sufficient, as it only protected the witness against the use of the testimony against him in some subsequent proceeding. It may well be said, therefore, that the immunity clause was not carelessly framed; it was framed in view of this decision, and after it was framed it was submitted to the careful scrutiny of able counsel, and sustained by the decision of this court in *Brown v. Walker*. Undoubtedly then, and as the natural sequence, the Congress, in passing the Immunity Statute in the Anti-trust Law, had the same object in view as had thus been accomplished under the Interstate Commerce legislation. We have seen

that this law was principally aimed at monopolies and restraints of trade imposed by large corporations. While in the case of the Interstate Commerce Law its provisions apply with equal force to individuals, yet it is a well known fact that in its criminal and preventive features it was principally aimed at corporate aggression. Two propositions are therefore evident; first, that when Congress passed this Immunity Statute, it had in mind the protection of the witness against any criminal prosecution or the infliction of any penalty and forfeiture which the Fourth and Fifth Amendments were designed to cover; second, that it was intended to enable the United States or private individuals to enforce the provisions of the Anti-trust Act against corporations. It is not necessary to claim that Congress had in mind that the Fifth Amendment applied to corporations. It is sufficient for this argument to say that it must be presumed that Congress intended the protection of this Immunity Statute to be as broad as the application of the Fifth Amendment* as it had been construed in previous decisions of this court; and, giving it that construction, it will accomplish the object intended by Congress. Manifestly, if the court is going to give to the Constitution

*See language, *People v. Butler, St. Fdy. Co.*, 201 Ill. 255.

an unnatural and strained interpretation to include corporate entities, it should not go to the other extreme and construe the immunity statute so strictly as to enable corporations to escape punishment. If the construction contended for is correct, Congress has enabled the court to enforce a rule against individuals, firms and partnerships which cannot be enforced against corporations. As we have seen, a person may then be required to testify against his neighbor, his employer, his partner, or his blood relation, but cannot be compelled to testify against a corporation of which he happens to be an officer. If this construction is to be given to the immunity clause in the Sherman Act, it must also with equal reason be applied to the immunity clause in the Interstate Commerce Act, and the line of decisions of this court holding that this immunity is effective would thereby be nullified. Such a construction, under the circumstances, would involve a severe reflection upon the sanity of the legislative body.

But it is claimed in this case that even if the constitution only protects the witness against disclosures which may tend to subject him to penalties and forfeitures for a crime, yet, under the broader rules and principles of equity, he is protected against any dis-

closure which might tend to subject him to a penalty or forfeiture, or "anything in the nature of a penalty or forfeiture," even though civil in its nature; that, if the constitution does not apply to corporations, the equity principles do, and relieve the witness and the corporation from disclosing any facts which might tend to convict them of a crime.

This raises a rather interesting question, but one we believe easy of solution. We contend, however, as we have heretofore argued, that when a witness is called in a pending action to prove facts tending to show the infraction of laws, the limit of the guaranty of silence is that provided for by the Fifth Amendment to the Constitution, and that, when this constitutional provision was enacted (which, as we have seen, embodies an unwritten rule of the English law), it was intended to be the sole limit of the right of silence.

We submit, therefore, this proposition, that if the word "person" in the Fifth Amendment to the Constitution includes corporations, then the word "person" in the immunity statute should be given the same construction and should be held to protect the witness and the corporation against every penalty and forfeiture included within the constitutional protection.

We now come to a consideration of what constitutes a penalty or forfeiture, as those terms are used in connection with the Fifth Amendment.

A careful determination of this question is important in view of the position taken in the court below by counsel for the appellants. In their brief used upon the hearing and filed with the court in Wisconsin, that position was expressed with great clearness as follows:

> "But the common law privilege which still exists, in the absence of a statute removing it, is broader than the constitutional privilege. The latter is limited to matters which may tend to criminate the witness or at the utmost, may subject him to a prosecution for a penalty or forfeiture in the nature of a criminal prosecution. And this constitutional provision, of course, operates to prevent the legislature from enacting any law inconsistent therewith; but the common law privilege, as we have seen, which exists independently of the constitution, and in the absence of any statute abrogating it, is available to excuse the witness from testifying to any matter tending to subject him to any loss or detriment in the nature of a forfeiture or penalty."

It will be observed that counsel conceded without qualification the principle that the constitutional guaranty protects the witness against exposure to only those penalties or forfeitures which are in the nature of a criminal prosecution. On the other hand, it is asserted that there is a common law privilege broader than this, which operates to protect the witness from loss or detriment in the nature of a forfeiture or penalty whether the element of a criminal prosecution be present or not. The fallacy involved in this comparison of the so-called common law privilege of protection in equity against the enforcement of forfeitures and penalties and the constitutional privilege against the compulsory giving of testimony against oneself in criminal cases, will be apparent when we consider the different senses in which the words "forfeiture" and "penalty" have been employed by the courts in dealing with these subjects.

The guaranty found in the Fifth Amendment is, of course, limited in its operation to criminal cases. In determining its application in specific instances, the courts have found it necessary to consider with some care what should be regarded as a criminal case within the scope of the amendment. There are various modes of punishment inflicted by law for the

commission of crime. The punishment may be visited directly upon the person through a sentence of imprisonment, or it may call for a deprivation of property to be turned over to the state. In the latter case it is usually a fine of an arbitrary sum of money. However, it is obvious that on principle any proceeding to deprive one of property as a punishment for crime must be regarded as a criminal case. Consequently, it has been held by this court that a proceeding to forfeit specific goods under the revenue laws on account of the owner's perpetration of a fraud upon the government in violation of the law, will be deemed a criminal case in this connection. Now a fine or a sentence of imprisonment for crime may be and is commonly spoken of as a penalty, and a deprivation of property for the commission of crime, as in the *Boyd* case, has been called a forfeiture. The penalty or forfeiture in either case is a punishment for the commission of a public offense, and it is only in this sense that the terms have ever been used by any court in discussing the operation and effect of the Fifth Amendment to the Constitution.

Let us now consider the meaning of these words as they appear in the standing maxim of equity that equity will not lend its aid to the enforcement of a

forfeiture or penalty. With the adjustment of rights and duties as between the individual and the state, equity does not have, and never has had, any direct concern; but with the adjustment of relations contractual and otherwise, between individuals, equity has always exercised its authority and jurisdiction. One of the most important, as well as one of the earliest functions of courts of equity, lies in the direction of relieving against the hardships which might be worked by one individual upon another under the inflexible rules of common law. For example, where a party was, under the technical rules of law, entitled to the penalty named in a bond or the forfeiture of an estate under a land contract, equity has always regarded the enforcement of the penalty or forfeiture as unconscionable where justice could be done between the parties in any other way. The principle has been admirably stated by Mr. Justice Story:

> "In short, the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principle intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof or the damage

really incurred by the non-performance. In every such case the true test generally, if not universally, by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus;* and when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages." Story's Eq. Jur., § 1314.

Reference is also made to Pomeroy on Equity Jurisprudence, 2nd Ed., Vol. 1, Section 432, *et seq.* Manifestly, the penalties and forfeitures which play so important a role in equity jurisprudence are those growing out of the contractual relations existing between individuals. They are totally disassociated from any principle of public policy, and concededly could be enforced were it not for the interposition

of equity asserting the right to compel the dominant party to desist from pursuing an unconscionable advantage. The question of right and wrong is one entirely between the parties themselves, and equity merely says to the creditor that he shall have from his debtor only that which in good conscience he ought to have regardless of any stipulation for a penalty or forfeiture of estate which may have been exacted in the bond or contract. It should be noted that equity carries the principle to the full length and consistently refuses to grant discovery which will aid in the enforcement by one party against the other of such penalty or forfeiture.

It must be apparent that these penalties and forfeitures which have been known to equity from the earliest times and have been clearly defined for centuries, are radically different from those spoken of in connection with the Fifth Amendment. Can there be any similarity between the penalty of a bond or the forfeiture of an estate, and those penalties or forfeitures which have been imposed for the commission of crime? Was equity ever known to interfere in any way with the imposition of forfeitures and penalties at the instance of the state as a punishment for crime? It might as well be said that the chancellor has authority to enjoin the King and his

agents from carrying out a sentence of death or imprisonment. We venture to assert that the books may be searched in vain for any trace of an equitable jurisdiction over criminal penalties or forfeitures. To invoke the operation of this ancient and salutary maxim of equity in a case of the sort now under consideration, is nothing more nor less than a bold attempt to pervert its meaning so as to cover matters for which it was never intended. Its purpose has always been to relieve the weak from the enforcement of unconscionable contracts at the hands of the strong. It was never designed as a cloak for malefactors to shield them from the consequences of their unlawful deeds. Here the government seeks not even to punish, but only to restrain the continued exercise of functions and the performance of acts which have been declared to be unlawful. In its attempt to secure the evidence necessary to establish the fact of the combination and conspiracy, it is met with this suggestion, that equity will not compel disclosures which may result to the parties and to the witnesses in some loss or disadvantage in the nature of a penalty or forfeiture. In so far as the penalty or forfeiture may be criminal in its character the guaranty of the Fifth Amendment applies, and as we shall see, is entirely saved by the immunity stat-

ute; in so far as the penalty or forfeiture is other than criminal, in so far as it involves the loss or forfeiture of the claim to a continued violation of the laws of the land, there is no principle either of constitutional law or of equity jurisprudence which may be invoked to relieve against it.

A review of some of the authorities will serve to enforce the principles we have just been considering. For example, it was settled at an early date in judicial history that pecuniary loss to the witness was not one of the penalties or forfeitures intended to be protected against by the constitution. The leading authority in this country on the subject is the opinion of Chief Justice Shaw, in *Bull v. Loveland,* 10 Pickering, 9. That opinion has been followed uniformly by all of the courts in the United States.

Greenleaf on Ev., Vol. 1, § 452 (15th Ed.);
Bull v. Loveland, 10 Pick. 9;
Baird v.Cochran, 4 Sergeant & Rawles, 396;
Lowney v. Perham, 20 Maine, 240;
Ward v. Sharp, 15 Vt. 115;
Harper v. Borough, 6 Iredells, 30;
Robinson v. Neal, 21 Ky. 212.

It is also held that a penalty of forfeiture must

be penal in its nature, as distinguished from pecuniary loss suffered as a consequence of civil liability.

Boyd v. United States, 116 U. S. 616;
Lees v. United States, 150 U. S. 476;
Huntington v. Attrill, 146 U. S. 657;
Brady v. Daly, 175 U. S. 148;
City of Atlanta v. Chattanooga Fdy. & Pipe Co., 101 Fed. 900;
State v. Jack, 69 Kans. 387; 76 Pacific, 911;
State v. Standard Oil Co., 61 Neb. 28; 84 N. W. 413;
Southern Ry Co. v. Bush, 122 Ala. 470; 26 Southern, 168;
Levy v. Superior Court, 105 Calif. 600; 38 Pacific 965;
Ames v. Kansas, 111 U. S. 449;
Wigmore on Ev., § 256, Vol. 3;
Beach on Private Corporations, Vol. 2, § 840.

In the *Boyd* case, as we have already had occasion to observe, the statute in question, providing for a forfeiture of goods, was held to impose a penalty and forfeiture as a punishment for the crime charged. The enforcement of such a penalty against the guilty party was naturally held to be a criminal case within the meaning of the Fifth Amendment. The word "forfeiture" as used in that case of course

meant forfeiture in the sense of a penalty for crime.

The same principle was laid down in *Lees v. United States, supra,* where the statute provided that any person violating the act prohibiting the importation and migration of foreigners and aliens under contract "shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor, including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the Circuit Court of the United States." Mr. Justice Brewer, writing the opinion of the court, said (p. 480):

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd v. United States,* 116 U. S. 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

In *Brady v. Daly, supra,* the court had before it a suit brought under § 4966 of the Revised Statutes, providing among other things that any person publicly performing any dramatic composition in violation of the copyright laws, without consent, etc.,

> "shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than one hundred dollars for the first and fifty dollars for every subsequent performance as to the court shall appear to be just."

In the court below it was held to be error to introduce the testimony of the defendant Brady, on the ground that the testimony tended to subject him to penalty and forfeiture. Subsequently the case was opened and other testimony added. While the court does not specifically mention the question of penalty and forfeiture, the finding was inconsistent with the opinion of the lower court. It was held, Mr. Justice Peckham writing the opinion, that the penalty mentioned in the statute was in the nature of liquidated damages, inasmuch as the whole recovery was given to the proprietor. The court said:

> "The statute itself does not speak of punishment or penalty, but refers entirely to the damages suffered by the wrongful act." * * *

> "The further provision of the statute that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one."

Huntington v. Attrill, supra, cited with approval in the *Brady* case, is the leading authority containing an exhaustive review of other cases on the subject. The facts there were as follows: Under the New York statute a director, signing and making oath to a certificate which he knew to be false, stating that the whole capital stock had been paid in, became thereby liable for all of the debts of the corporation. The question raised was whether the statute was a penal one or whether it merely imposed a civil liability. The court said that the question depended upon whether the purpose of the statute was to punish an offense against the public justice of the state, or to afford a private remedy to the person injured by the wrongful act. Among other things it was said (p. 666):

> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced

by the state, for a crime or offense against its laws. *United States v. Reisinger,* 128 U. S. 398, 402; *United States v. Chouteau,* 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to **cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond.* In the words of Chief Justice Marshall: 'In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party.' *Tayloe v. Sandiford,* 7 Wheat. 13, 17.

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the

*Italics are ours.

> executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

The attention of the court is invited to the very clear statement of the distinction between a penal sum, such as a penalty of a bond, and the penalty imposed by statute as a punishment for crime. The court, summing up the subject, said (p. 668):

> "The test whether a law is penal in the strict and primary sense, is whether the wrong sought to be redressed is wrongful to the public or wrongful to the individual, according to the familiar classification of Blackstone."

It is a noticeable fact that this case involves a construction of the same statute in New York which was considered by the Court of Appeals of New York in *Merchants Bank v. Bliss,* 35 N. Y. 412, cited by the appellant. In that case the Court of Appeals of New York held that such an action was an action upon a liability created by statute for a penalty or forfeiture, and therefore was barred in three years. If the case can have any possible bearing upon the question at issue, it is in direct conflict with *Hunting-*

ton v. Attrill, and it is to be noted that the court in the latter case cited and distinguished it. (See page 678 of opinion.)

In *Atlanta v. Chattanooga Foundry & Pipe Co. supra,* it was held that suits brought to recover damages, under § 7 of the Sherman law, are civil in their nature and not penal.

In *State v. Jack, supra,* a proceeding was instituted under the anti-trust law of Kansas for the investigation of a combination of coal operators. An officer of one of the defendant corporations declined to testify, on the ground that the evidence, if given, would subject him to imprisonment, fine, forfeiture and penalties, contrary to the constitution. The anti-trust law contained an immunity provision, reading as follows:

> "That any person subpoenaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify, neither shall the evidence of such witness be used against him in any criminal proceeding."

The witness's contention amounted to saying that he would be subjected to loss as a stockholder in the defendant corporation, because the evidence, if

given, would tend to a forfeiture of the charter, rights and franchises of the corporation by the state. The court said:

> "Section 4 of the act provides that, for a violation of any of the provisions of the act by a corporation or any of its officers or agents the corporation shall, upon proper proceedings therefor, forfeit its charter, rights and franchises. It is urged that the amnesty provided by section 10 is not complete, as it affords no immunity to a stockholder in any such corporation. There is nothing in the record disclosing appellant to be a stockholder, an officer, or agent, or otherwise connected with any corporation that may in any manner be affected or suffer as the result of his disclosure as a witness. * * * The hurt must be his own. He must himself be included in the terms of the law before he has just grounds for complaint. **State v. Smiley,* 65 Kan. 240; 69 Pac. 199. However, it was never intended that the immunity afforded the witness by the act should extend to and protect the stockholders, officers, and agents of a corporation, as such. The immunity extends to the

*Affirmed *Smiley v. Kansas,* 196 U. S. 447

witness alone. It was not contemplated that it should be made use of as a pretext for securing immunity to others. That the immunity afforded the witness, to be complete, must extend to the officers, agents, and stockholders of a corporation, as contended for by appellant, is too remote."

State v. Standard Oil Co., supra, was a proceeding in the nature of a *quo warranto,* instituted under the laws of Nebraska, to prevent the Standard Oil Company from continuing business in the state. Under the law the attorney of the state was authorized to demand of the defendant permission to inspect and copy any book, paper or document in the possession of the adverse party or under his control, containing evidence relating to the merits of the action. A motion was made by the attorney general for such inspection. It was resisted, on the ground that the purpose of the suit was the imposition of a penalty or forfeiture, and that to grant the order would require the defendant to furnish evidence against itself in a criminal case, in violation both of the Constitution of the United States and of the Constitution of Nebraska. The court held that to prevent the corporation from continuing to do business in the state after it had violated the law was

not the infliction of a penalty or forfeiture within the meaning of the constitutional guaranties. The court said:

> "And it will be also observed that the third section provides a civil remedy on behalf of the state for the commission of these same acts. It is true that the forfeiture of the charter of a domestic corporation is a consequence of violating the law, but it is not a penal consequence. The proceeding by *quo warranto* is a civil remedy. It is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. *State v. Nebraska Distilling Co.,* 29 Neb. 700; 46 N. W. 155; *Ames v. Kansas,* 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482 ; *State v. City of Topeka,* 31 Kan. 452, 2 Pac. 593; 2 Beach, Priv. Corp. § 840. The fourth section is, in substance, like the third. It provides that a corporation domiciled in another state may, by reason of having done one or more of the criminal acts mentioned in the second section, be excluded from the state. The attorney general is authorized to proceed against it by injunction or *quo warranto.* The latter remedy, which

> is included in the phrase 'other proper proceedings,' may, with propriety, be resorted to for the purpose of preventing a corporation created in one state from doing business in another contrary to law. Title 23, Code Civ. Proc.; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; 2 Beach, Priv. Corp. § 841."

This court held in *Ames v. Kansas, supra,* that a *quo warranto* proceeding was not a criminal proceeding; that it was in the nature of a writ of right to inquire by what right one who usurped or claimed franchises or liberties claimed the same.

In *Southern Ry. Co. v. Bush, supra,* the court had before it an Alabama statute, providing that personal representatives may maintain an action for the wrongful act, omission or negligence of another person, whereby the death of the testator or intestate was caused. The statute also provided the measure of damages. The plaintiff propounded to the defendant certain interrogatories, which the latter declined to answer, on the ground that they would tend to subject him to a penalty or forfeiture under the statute. The court said:

> If the damages recoverable in an action of this character were, strictly speaking, a

penalty imposed by law, we would be inclined to give to our constitutional provision on the subject the some construction that has been placed on the similar provision of the federal constitution, and to hold that the defendant could not be compelled, even by statute, to give or furnish evidence in aid of a recovery against it. But while the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not, in a strict sense, a penalty; nor is the action penal, or quasi criminal, within the meaning of the constitutional provisions as above construed. The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides;' and the action given is purely civil in its nature, for the redress of private, and not public, wrongs."

Levy v. Superior Court, supra, brought up for consideration a statute providing for an order for disclosure by an administrator as to property disposed of by him without authority. It was, among other things, provided that any judgment recovered therefor should be for double the value of the prop-

erty assessed by the court or jury, or for a return of the property and damages in addition thereto equal to its value. The defendant claimed the privilege of refusing to testify, on the ground that the disclosure would submit him to the penalty or forfeiture within the meaning of the Fifth Amendment. The court considered the *Boyd* case, and distinguished it, holding that the action in question was a civil action for the conversion of property, and that the imposition of double damages was not the infliction of a penalty or forfeiture as punishment for a criminal act.

The following statement by Mr. Wigmore, in § 2257, clearly points out the distinction:

> "The distinction between a penalty and a forfeiture is a shadowy one; though both are in essence contrasted with a civil liability. A penalty may be defined as a liability to pay money or to yield up a public privilege by way of punishment imposed by law. When the penalty lies in the yielding up of a privilege, a distinction therefore seems proper between inflicting a punishment and restraining the continued improper exercise of functions. The process of impeachment seems to fall in the former class; but most other processes of

removal or restraint would ordinarily come within the latter description. When the penalty lies in the payment of money, it seems clear that a mere unregulated increase of compensation under the name of exemplary damages is still a civil liability in essence; and therefore the same consequence ought to follow when by statute a fixed sum, or a multiple based on actual loss, is prescribed. In any case, the form of the proceeding is not decisive, for in the name of the state a proceeding essentially civil is sometimes conducted; and, conversely, a specific penalty for wrongdoing is sometimes made recoverable at the suit of an informer or other person by way of encouraging detection and prosecution."

All of the authorities cited by the counsel in the court below on this subject can be distinguished upon the lines we have suggested. Most of them are cases where the court had under consideration no question under the Fifth Amendment, but where the court was applying the principle of the equitable doctrine that a court of equity would not enforce a forfeiture or by discovery aid a court of law to do the same.

A fair illustration is the case of *Livingston v. Tompkins,* 4 Johnson's Ch. 416, in which a suit was brought to obtain the forfeiture of the right of the complainant to run a steamboat between New York and New Jersey. The court said:

> "It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture. * * * The great principle is that equity will not assist in the recovery of any penalty or forfeiture when the plaintiff may proceed at law to recover it."

Everything else in that case must be understood in the light of the facts which were before the court and the principles which were being invoked.

In the case of *In Re Kip,* 1 Paige, 601, the witness Kip had been called upon to give testimony before a master in ejectment proceedings brought by one Van Kleeck against the elders, ministers and deacons of the Reformed Protestant Dutch Church, in the city of New York, and others. Kip appeared before the master, but refused to testify, on the ground that he was the treasurer and one of the corporators of the Dutch Church, and was also a pew-

holder in two churches which were on land the title to which depended upon the same question which arose in the cause. Chancellor Walworth held that the witness was not so far a party to the suit (at law) as to be excused from testifying against the corporation. The principal question considered in the opinion is whether the witness might refuse to testify on the ground that his answers might expose him to civil suit or pecuniary loss. The Chancellor arrived at the conclusion that a witness, neither nominally nor substantially a party to the suit, was not exempt from giving evidence, although the evidence might be used against him in a civil suit, unless the disclosure would subject him to some loss or disadvantage *in the nature of a penalty or forfeiture.* There is no consideration whatever of the question of what sort of penalty or forfeiture would operate as an excuse, and the use of the phrase "in the nature of a penalty or forfeiture" does not appear to be significant in view of the fact that this phrase "subject him to a penalty or forefiture" and the phrase "something in the nature of a penalty or forfeiture" are used in the opinion interchangeably.

Livingston v. Harris, 3 Paige, 527, involved a construction of an amendment to the usury laws of the State of New York. Under the theretofore pre-

vailing practice on a bill of discovery brought by the debtor against the lender to compel disclosures relating to a usurious transaction it was held necessary for the complainant to pay or offer to pay the principal and legal interest into court. Otherwise, the disclosure would not be required. A statute had been passed reciting in substance that in such cases in the future it should not be necessary to pay or offer to pay the interest, and the question was whether the statute should be construed to dispense with the payment not only of interest but of the principal. The court held that it only dispensed with the offer to pay interest, and that the principal must still be paid or offered to be paid, before discovery would be compelled. The decision was affirmed in 11 Wendell, 330. The point decided, of course, has no bearing upon the question before this court.

Let us now consider the penalties and forfeitures which the appellants plead they will be subjected to if the witnesses are compelled to testify as required by the court below. Those are specifically pleaded in the answers, and it is pertinent here to remark that the witness is not the sole judge of whether the testimony will tend to criminate him or not.

Counselman v. Hitchcock, 142 U. S. 547;
Opinion of Chief Justice Marshall in *Burr's Trial,* 1 Burr's trial, 244;

Cockburn, Chief Justice, in *R. v. Boyes,* 1 B & S. 311;

Opinion of Justice Mitchell in *State v. Thaden,* 43 Minn. 253.

To be sure, if the question be of such a description that the answer to it may or may not criminate the witness, according to the purport of the answer, then of course, if the witness swears that it will tend to criminate him, it is conclusive; but, nevertheless, it is for the court to say, from all the circumstances of the case, whether the testimony will tend to criminate him or not. Chief Justice Marshall, in the case above cited, stated the rule as follows:

> "When a question is propounded, it belongs to the court to consider and decide whether *any* direct answer to it can implicate the witness." (See review of this decision, Wigmore on Evidence, Vol. 3, § 2271, p. 3140.)

It will not be necessary to consider all of the privileges pleaded by the various witnesses, as they are substantially identical, and have been heretofore classified in this argument. It will be sufficient to consider certain privileges pleaded by the witness Alexander and the General Paper Company. As to those privileges where it is claimed that the testi-

mony will tend to convict them of a crime and subject them to penalties and forfeitures under the federal laws, they have been sufficiently considered under that branch of our argument wherein we discuss the application of the Fifth Amendment to corporations and the protection of the immunity statute. It is urged that the Sherman act is a penal statute. This is not denied. The act provides for only two classes of fines, penalties or forfeitures. The first is a fine or imprisonment for violation of the act; and the second is a forfeiture of property in the course of transportation from one state to another, etc. This latter can only take place in a proceeding against the property seized, such as now provided, for the seizure and condemnation of property imported into the United States contrary to law. As to these two penalties and forfeitures, being the only punishments imposed by the Sherman act, we have seen that the corporation and the witness are thoroughly protected. Section 7 provides that any person who shall be injured in his business by reason of anything forbidden in the act may sue for damages therefor in any circuit court of the United States. With the exception of the provision for treble damages, this statute no more than expresses the rule of the common law. We take it at

common law any person could sue for damages, as such monopolies were invalid, and a recovery of treble damages as compensation to the person is not a penalty and forfeiture within the meaning of the Fifth Amendment.

Huntington v. Attril, 146 U. S. 657;
Brady v. Daly, 175 U. S. 148;
See also especially *City of Atlanta v. Chattanooga Foundry & Pipe Co.,* 101 Federal, 900, where the question involved was under this very section.

While it is not specifically pleaded, it is claimed, that the granting of an injunction as the result of this suit to restrain the continuance of the unlawful combination and conspiracy in restraint of trade is itself a subjection of the corporation and of the individual witness to a penalty and forfeiture, or something in the nature of a penalty or forfeiture, and to loss and damage contrary to the Fifth Amendment of the Constitution. It will not be claimed, of course, that an equitable suit to enjoin the continuance of a conspiracy is a criminal case. The witness Alexander and the General Paper Company each pleaded that the object of this suit is to enjoin the General Paper Company from carrying on the business for which it was incorporated and carry-

ing out certain contracts and agreements existing between the General Paper Company and each of the twenty-three constituent corporations. These contracts are identical in form (Record in Wis. cases, page 496, Exhibit 30), and in substance created the General Paper Company the exclusive selling agent of the corporations defendant for the period of five years, and provided that the corporation will not sell any of its own product during said time. It will be remembered that these contracts were a part and parcel of the original scheme for which the General Paper Company was organized. It is claimed that these contracts constitute a valuable property right, and that to enjoin the General Paper Company from carrying them out will subject it to injury, damage and loss in the nature of a forfeiture, and consequently that the constituent companies and the stockholders therein will be subjected to a like damage and loss. It may be mentioned here that Alexander is not a stockholder in the General Paper Company. (Stipulation, Record, p. 301.) He alleges in his answer that he is such a stockholder. The plea is specious, and one not borne out by the evidence. It was not claimed in the court below, and will not be here claimed, that he has any interest in the stock, but simply holds it for certain corporations in which he is a stockholder.

This action is brought solely for the purpose of enjoining the continuance of the unlawful combination. These contracts were entered into as a part and parcel of the conspiracy, and no person can obtain a property right in the continuance of an unlawful business void in its inception. If such could be claimed, then the result would be that the corporation would have a property right in the continuance of a contract for conspiracy, or as a part of the conspiracy, in violation of law, and would be protected in that property right by the Fourteenth Amendment to the Constitution, providing that property shall not be taken without due process of law. In other words, having no right to violate the law, but having done so, he obtains a vested right in such violation, protected by the Constitution of the United States. But it was urged that the contracts were valid in their inception, and will only be rendered invalid by a decision of this court enjoining the General Paper Company from carrying them out. The answer is, that if the contracts were valid in their inception, and if the conspiracy consists of other separate and distinct acts afterwards done, then a decision of this court will not affect them. In other words, if the contracts are valid, then the witnesses and the corporation can lose nothing by dis-

closing the facts in relation thereto; if invalid, they have no property right in them. We venture to say that it has never before been claimed in a court of justice that persons or corporations could obtain a right of property in a combination or merger of interests in violation of the federal statute, so that an injunction preventing the continuance of the combination or conspiracy would in itself be the infliction of a penalty or forfeiture prohibited by the Fifth Amendment. Such a position necessarily would perpetuate an unlawful conspiracy, monopoly or contract in restraint of trade. If such a principle can be invoked in defense of this action, what would have been the result in the *Northern Securities* case, where the two corporations did not simply create a general agent to do their business, but the stockholders sold and transferred their shares of stock to a holding company, which issued its stock to the extent of hundreds of millions of dollars, and sold it in the markets of the world to innocent purchasers? But it is urged that the General Paper Company has made various contracts, as appears by the record, with newspaper publishers and others, for the sale of the paper manufactured by the constituent mills, and that it has a property right in these contracts which will be destroyed by an in-

junction in this case. The answer to that proposition is simply, that a decree preventing the continuance of the combination in restraint of trade will not affect sales of property already made or contracts for sales entered into.

Connolly v. Sewer Pipe Co., 184 U. S. 540.

Let us see what will be the effect of granting an injunction in this case against the continuance of the monopoly or contract in restraint of trade, in other words, against the General Paper Company's continuing to act as the general sales agent for these defendant corporations under its organization. Under no proceeding provided for by the federal statutes or jurisprudence, can the charter of the General Paper Company or the charter of any of the defendant corporations, be forfeited. The powers of the General Paper Company as expressed in its articles, and the powers of the other corporations so expressed, are legal. The General Paper Company was organized to act as a selling agent,—a perfectly legal business,—and to the extent that it has not violated the federal statutes, its business is a legal and legitimate business not within the reach of Congress. The other corporations were incorporated to manufacture and sell paper; some of them for other purposes; and to

the extent that they have not entered into a combination, their business is legitimate and legal. The Anti-trust Act does not authorize the forfeiture of any of the property (except property in the course of transportation) nor the charters of any of the corporations. When this injunction is granted, the General Paper Company will own its assets, moneys, credits and contracts for the sale of paper, and the other corporations will own the stock, (if permitted by state laws) in that company. Their property will not be affected, except as its use may be affected by reason of the fact that they cannot continue the unlawful transaction entered into. But it is said that the business of the various corporations will be injured; that they will be discredited in the public eye. It is entirely true that in so far as this combination has enabled them to extort unreasonable prices from the public, their business will be affected and in so far as the exposure of this conspiracy will affect their business and discredit the stockholders connected with them, they will also be injured; but this is not a penalty and forfeiture within the meaning of the Fifth Amendment. It was held in *Brown v. Walker, supra,* that the fact that the witness might incur personal odium and disgrace by answering the questions, was not an excuse under the Consti-

tution. Is discredit and injury to one's business greater in the eyes of the law than the good name of the individual? Does mere financial injury and loss stand higher before the law, and demand greater protection, than the honor and reputation of the citizen? Each of these defendant corporations and each stockholder therein will, if this injunction be granted, own all the property it or he ever owned. The injunction will not take from them one dollar of property and forfeit it to the state. Its effect will simply be to put a stop to the continuance of that mode of business which the law condemns, and the injuries incident to this are the results of their own unlawful acts, and are not legitimate subjects for the protection of the Constitution. The court has a right, therefore, to say from the record in this case, that the witness and the corporation will not be subjected to any penalty or forfeiture contemplated by the Constitution.

If these positions are well taken, they dispose of the rights of the witnesses as stockholders in any of the corporations and of all of the pleas of the defendant corporations except the forfeitures and penalties which it is alleged may be incurred under the laws of Wisconsin and Minnesota; for if the corporation is not protected by the Fifth Amend-

ment, then the possibility of a loss to the stockholder in any of the defendant corporations by reason of the corporation being subjected to any loss or damage in the nature of a forfeiture is too remote.

Brown v. Walker, 161 U. S. 591.

State v. Standard Oil Co., 61 Nebr. 28; 84 N. W. 413.

State v. Jack, 69 Kans. 387; 76 Pac. Rep. 911.

No mere possibility of a liability or loss undefined is sufficient.

Brown v. Walker, 161 U. S. 608.

But, if possible loss as a stockholder in a corporation which may be hereafter fined or subjected to a penalty for the violation of a statute comes within the protection of the Fifth Amendment, then the amnesty statute is broad enough to cover it and protects both the stockholder and the corporation.

It is apparently not claimed, however, by the corporation or by the witnesses, that there can be any forfeiture under the statutes of the United States, and it is therefore alleged in substance that each of the defendant corporations (in some of which the witnesses are stockholders) may be subjected to the forfeiture of their charters, and to penalties, under the laws of the states of Wisconsin and Minnesota,

and consequently that both the corporations and the witnesses are entitled to refuse to answer.

For the purposes of this argument, we shall assume that the statutes of the respective states, or in the absence of a statute, that the general law, authorizes the state to take away the charter of a company, if it violates the laws of the state of its creation. But no state can punish a citizen or a corporation for any violation of the Interstate Commerce Act, as Congress has exclusive jurisdiction over the subject therein treated.

It is our claim that this court has settled the question that the immunity statute of Congress is broad enough to protect the witness against any prosecution for or on account of anything which he may disclose in response to the command of the federal court, whether under federal or state jurisdiction.

Brown v. Walker, 161 U. S. 606;
Interstate Commerce Commission v. Baird, 194 U. S. 25.

These decisions seem to us to be conclusive on this question. We ought therefore with propriety to refuse to argue it; but the earnest insistence of counsel for the appellants in the court below that

Brown v. Walker does not control this case, and that, if it does, the decision is wrong, leads us to a brief examination of the foundation of this principle.

We believe that either one of two propositions is a complete answer to the contention of the appellants; first, that the constitutional guaranties have reference only to offenses against the sovereignty which enacted them; second, if prosecutions under state laws may, for this purpose, be considered within the same sovereignty and therefor within the constitutional protection, then the immunity statute is broad enough to afford protection.

First. We start with the proposition that the Fifth Amendment is a limitation upon the federal authority and not upon that of the state.

Brown v. Walker, 161 U. S. 606 of opinion;
Barron v. Baltimore, 7 Peters, 243; 10 Curtis 464.
Fox v. Ohio, 5 Howard, 410.
Withers v. Buckley, 20 Howard, 84.
Twitchell v. Commonwealth, 7 Wallace, 321.
Presser v. Illinois, 116 U. S. 252.

It follows that the provision of the Fifth Amendment that no person shall be compelled, in a criminal case, to be a witness against himself, operates to protect the witness only when testifying pur-

suant to federal authority, and not when testifying pursuant to authority of the state. That is to say, a witness testifying in a criminal prosecution in a state court cannot invoke the protection of the federal constitution. From this it is a fair and natural deduction that a witness testifying in a proceeding in a federal court, cannot claim protection by reason of the fact that he may be subjected to prosecution by state authority. In other words, the federal constitution was designed to protect the witness against the oppressive methods of its own jurisdiction, and of no other. The boundaries of the constitution, and of the sovereignty which established it, are the same. Wigmore on Evidence, Vol. 3, Sec. 2258. The courts are not presumed to know the laws and customs of a foreign state, or to know the probabilities of danger to the witness from such a source. Again, our laws may not be in harmony with those of other governments. It cannot be that the constitution contemplated that a witness called and compelled to testify pursuant to federal authority, should be protected against the consequences of political crimes in Russia, or what would constitute *lese majeste* in Germany.

It has been held that this principle which has become a cardinal principle of the unwritten con-

stitution of England, does not protect the witness against prosecution by a foreign jurisdiction. Lord Cranworth, V. C. in *King of Sicilies v. Wilcox,* 7 State Tr. New Series, 1049, 1068. And it seems to us that the authorities we have cited have substantially applied the same principle as between the states and the federal government.

In *Fox v. State of Ohio,* 5 Howard, 432, this court held that the provision of the Fifth Amendment to the Constitution, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, did not protect a person from punishment under state laws where the act committed was in violation of both state and federal laws. The defendant in that case was convicted for passing counterfeit money in violation of the statute of Ohio. From a judgment of conviction in the state court, a writ of error was taken to the Supreme Court of the United States. It was claimed for the plaintiff in error that the statute of Ohio was repugnant to the fifth and sixth clauses of the eighth section of the first article of the Constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting current coin of the United States. The court held,

however, that there was a material distinction between the offense of counterfeiting coin and of passing base coin; that one was counterfeiting, and the other was a cheat or fraud punishable by the state laws. It was held, however, that (conceding for the purpose of the argument that Congress could undertake to punish a cheat perpetrated between citizens of a state because the instrument in effecting that cheat was a counterfeit coin of the United States) the fifth article of the Amendment to the Constitution was not designed as a limit upon the state government in reference to their own citizens, but simply as a limit upon the federal government to protect a defendant from being twice put in jeopardy under the federal laws, and that prosecution under the state laws for the same offense was not prohibited by this provision of the Constitution. The principle is the same as that in the case at bar. The provision here involved, that a person shall not be compelled in a criminal case to be a witness against himself, was not designed to protect the witness from prosecution by a separate government or sovereign power, and when Congress passed an immunity statute which would prevent prosecution under federal laws, the guaranty of the Constitution was fulfilled in the same manner as in the *Fox* case

the guaranty of the Constitution was held to be fulfilled by preventing a person from being twice put in jeopardy of life and limb by federal prosecution.

In the regulation of purely internal matters, the states are in effect separate sovereignties. Their laws are supreme and have no extra territorial effect. No state could grant immunity to its citizens for infringement of the laws of another state. Every principle which applies to separate nations applies with equal force to the states; and it has been held, in the only states where the question has been decided, that this provision of the state constitution does not protect a witness against giving testimony which may tend to convict him under federal laws or the laws of other states.

People v. Butler Street Foundry, 201 Ill., 248;
**State v. Jack,* 69 Kansas, 387, 76 Pacific, 911;
State v. March, 1 Jones Law, (N. C.) 526.

Second. But if a distinction may be made between prosecutions under state laws and prosecutions by separate governments, in other words, if the states are to be considered for this purpose within the same sovereignty so that state prosecutions may be said to fall within the contemplation of the Fifth Amend-

*The decision of this court, affirming this case, has been so recently ade that it has been impossible for us to consider it in the brief.

ment, then it seems to follow that the immunity statute is broad enough to protect the witness against any prosecution, state or federal.

It was held by this court in *Brown v. Walker* that while the Fifth Amendment is a limitation only upon the power of Congress and does not apply to a witness testifying in a state court, still, the immunity statute is not restricted to prosecutions, penalties or forfeitures in federal courts, but is universal in its application, and prevents any prosecution, penalty or forfeiture in any proceeding under any authority on account of anything disclosed pursuant to the authority of the federal court. The 6th article of the Constitution provides:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

While it will be seen, from authorities we cite, that the decisions of the state courts have followed this case, and have applied the same rule to wit-

nesses testifying under the immunity statute of the state, some question might be made as to whether a witness in the state court could plead such an immunity, for the authority of the state manifestly is not supreme over that of Congress. But it is not consistent with the exclusive federal control over interstate commerce that Congress should be impotent to provide a remedy for the violation of its laws, because forsooth, some state authority may attempt to punish a witness on account of something in relation to which he may testify. When the constitution conferred upon Congress the power to regulate commerce between the states, the power given was exclusive, and carried with it all the necessary powers to enforce those regulations, and to protect the citizen in obeying the regulations thus made. Its powers are not confine simply to regulating the commerce, but, pursuant to this power, Congress may perform all things necessary to make that regulation effective.

Gibbons v. Ogden, 9 Wheaton, 1;
Wabash Ry. Co. v. Illinois, 118 U. S. 557;
Kidd v. Pearson, 128 U. S. 1;
The Daniel Ball, 10 Wallace, 557;
Hall v. DeCuir, 95 U. S. 485;
Jacobson v. Massachusetts, 197 U. S. 25.

In *Gibbons v. Ogden,* 9 Wheaton, 1, Chief Justice Marshall settled for all time the supremacy of federal power over interstate commerce. He held that the power was plenary and exclusive of state control or interference; that when necessary to effectuate the regulations adopted by Congress, the exercise of the power does not stop at state lines, nor yield to the power of the state, even though exercised in the regulation of its purely internal affairs; that, while conceding to the states exclusive jurisdiction over its internal affairs,—such as municipal control, taxation, the control of purely internal commerce,—yet, whenever the state laws or regulations come into conflict with the exercise of any power committed to Congress necessary to the control of its commerce, the state regulations must necessarily yield. He said (Curtis Ed. p. 8. of opinion):

> "The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal affairs which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general

powers of the Government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines."

Again (page 16 of opinion):

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends upon their interfering with and being contrary to an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and depriving a citizen of a right to which that act entitled him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the

several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

In the case of *Kidd v. Pearson, supra,* the court said (p. 18):

"Sacred, however, as these reserved powers are regarded, the court is particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations, and among the several States; and that whenever these reserved powers or any of them, are so exercised as to come in conflict with the free course of the powers vested in Congress, the law of the State must yield to the supremacy of the federal authority, though such law may have been enacted in the exercise of a power undelegated and indisputably reserved to the States."

This position is very clearly illustrated in a

later decision of this court, *Leisy v. Hardin,* 135 U. S. 100.

The proposition again received the approval of this court in the case of *Addyston Pipe & Steel Co. v. United States,* 175 U. S., page 227, of the opinion.

The statement of this principle by Chief Justice Marshall is sufficient to illustrate the point which we make; that the power to regulate commerce is exclusive in Congress; (and especially is this so when Congress has acted.) This power is not simply confined to the power to regulate, but it extends to all the incidents of commerce, and it necessarily includes the power to enact such legislation for the protection of the citizen as will make this regulation effective. The provision of the Fifth amendment protecting the witness against incriminating himself and providing "that he shall not be deprived of life, liberty or property without due process of law, nor shall his property be taken for public use without just compensation" must be construed in connection with the provision of the Constitution granting the Congress exclusive control over commerce; and so construed, Congress must have the power to enact such legislation consistent with the Fifth Amendment as will enable it to enforce the laws

regulating that commerce. If the premise is granted, as it must be, that the laws enacted by Congress pursuant to the Constitution are the supreme law of the land, and that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary nothwithstanding," then the natural consequence of this position is that when Congress deems it necessary to grant to a citizen immunity in order that the avenue may be open to enforce a regulation of commerce, that immunity will protect him within the borders of the state and against any state action, or any action of the judges of the state, anything in the state laws or constitution to the contrary notwithstanding. Otherwise, all immunity laws are necessarily of no effect, for if Congress cannot pass an immunity law whose protecting shield reaches to the extent of the power of Congress under the commerce clause, it can practically pass no immunity law whatever, because no cases at this day arise under the Interstate Commerce Act or the Sherman Anti-Trust Act where the witness could not plead that the testimony *might* tend to convict him of a violation of some state law.

We do not mean by this that there is any real danger of state prosecution on account of these dis-

closures; but that, as nearly all of the states have statutes regulating intrastate commerce, and prohibiting monopolies and contracts in restraint thereof, and as these statutes are very largely modeled after the federal statutes, of course it is easy enough for the witness to make the plea.

The result is that the power of Congress must necessarily be supreme, and if either party must yield to the other, clearly the power of the state is subordinate to that of Congress. Unless the position we take is true, the immunity statute, which has been in existence and upheld by this court in several cases, is mere waste paper; Congress cannot enact one which is broader, and no immunity statute could be enacted except, possibly, with the concurrent action of the Congress and all the states. And we might suggest that this could not be done, because the power of the state to legislate in relation to the immunity of a witness called to testify as to an infraction of the interstate commerce laws, may well be questioned. The position we take is illustrated by a line of decisions in which this court has held that the federal authority is supreme in all matters necessary to effect a complete execution of the federal power conferred by the Constitution. To

illustate: *In Ohio v. Thomas,* 173 U. S. 277, it was held that in feeding the inmates of a soldiers' home in Ohio in accordance with the legislation of Congress in that respect, the governor of the soldiers' home is engaged in the administration of a federal institution, and that state authorities have no constitutional power to interfere and prevent him from furnishing articles of food, although under the police law of the state those articles do not comply with the regulations thus prescribed by the state authority. This case arose under the oleomargarine law of Ohio.

In *Tennessee v. Davis,* 100 U. S. 263, a revenue officer was indicted for murder, in the state court of Tennessee. He claimed that what he was doing was in the pursuance of his duty as Deputy Collector of Internal Revenue and in self defense. The case was removed to the federal court. Passing upon this question, Mr. Justice Strong said:

> "We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited

> in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

A like holding was made in the case of *Ex Parte Siebold,* 100 U. S. 371, in which the court held that, in the enforcement of the regulations for the election of representatives, the power of Congress is supreme.

A noted case on this subject is the case of *In Re Neagle,* 135 U. S. 1, in which it was held that an assault upon a judge of the United States Court, in the discharge of his duties, was a breach of the peace of the United States, as distinguished from the peace of the state; that it was the duty of the marshall to do whatever might be necessary to protect the judge, even to the taking of human life, and that the power of the federal courts to protect the dignity of the court and the person of the judge could not be limited by state authority.

These illustrations of course are familiar to the

court, and scarcely need the discussion of counsel, but they apply with irresistible force to the principles we invoke.

Again, we take it to be the law that no state has power to revoke the charter of a state corporation, or to punish one of its citizens, for an infraction of the federal law. *Tennessee v. Davis, supra.*

In *Re Loney*, 134, U. S. 375, the court held that no state could, under its statutes, punish a witness for perjury who was giving his testimony pursuant to the constitution and laws of the United States, in a case pending in the federal court or other federal tribunal, whether he testified in the presence of that tribunal or before a magistrate, either of the nation or of the state. It is manifest, of course, that power to punish an infraction of the Interstate Commerce Law or the Sherman Act is exclusively in Congress and in tribunals upon which Congress confers the power.

In the court below, counsel cited a long line of decisions showing that over purely intrastate commerce, Congress has no power. No one for a moment questions this proposition, that, in the matter of the regulation of those purely internal affairs, the power of the state is supreme; but whenever the

power of the state, even in the regulation of internal matters, conflicts with the power of Congress in the regulation of interstate matters, the power of Congress is supreme.

The language of Mr. Justice Harlan, in the very late case of *Jacobson v. Massachusetts,* 197 U. S. 25, clearly expresses the view we desire to impress upon the court:

> "A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the constitution or with any right which that instrument gives or secures."

We admit that the proposition, when stated in the bald form that the states have power to punish infractions of the laws in relation to their purely internal affairs, appeals to us with particular force, and at first blush seems to imply that this power is not subject to any superior restraint. It is not subject to any direct superior legislative or judicial restraint, except where, in the exercise of the exclusive and undoubted powers of the federal government, it becomes necessary, by reason of conflict of

authority, that there should be one supreme power. And, when this becomes necessary, there are no limitations to the power of Congress, except those limitations for the protection of property and the rights of a citizen guaranteed by the constitution of the United States or by the unwritten law of the land.

By granting a witness immunity against a state law, or state prosecution, Congress is not legislating in relation to purely internal state matters that are beyond its constitutional power. There is a vast difference between Congress legislating upon the purely internal affairs of the state, and Congress legislating upon matters committed to it by the constitution, purely federal in their nature, in such a manner as to come into conflict with the laws and regulations of the state. While Congress could not have power to pass a bill directly regulating the purely internal matters of a state, it has power to legislate upon matters committed to it by the constitution, although its legislation may nullify state laws regulating purely internal affairs. Each power as conferred is exclusive in its own sphere, except, as we have seen, where they conflict; and, when they conflict, the power of Congress must be held to be supreme. Any other construction would materially cripple the power of Congress, in fact, would de-

prive it of the power to enforce regulations of interstate commerce. Under our dual system of government, it is absolutely necessary that, in cases of conflict, one should be supreme. And it seems to us, if it is necessary, in the enforcement of the laws regulating commerce, to grant immunity to a witness, that immunity must cover all territory over which the laws of Congress are supreme.

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APPENDIX.

CLASSIFICATION OF REFUSALS.

With references to the schedule of refusals and the transcript of record.

I.

RECORD BOOK OF THE GENERAL PAPER COMPANY.

Refusals to read any part of page 70 of the record-book, especially that part showing the election of W. Z. Stuart as second vice-president of the General Paper Company.

Also, refusal to submit the record-book (Exhibit 29) to the inspection of counsel for the Government, regarding the meeting of December 8, 1903, other than that part reciting the election of Stuart as second vice-president.

Alexander's refusal No. 1, fourth question on page 147;

Alexander's refusal No. 2, seventh question on page 147;

Alexander's refusal No. 3, third question on page 148, of the transcript of record in the Alexander appeal.

Refusal to allow an inspection of the record of the meeting of the stockholders held December 8, 1903.

Alexander's refusal No. 4, fifth question on page 149;

Alexander's refusal No. 5, first question on page 150;

Alexander's refusal No. 6, request near middle of page 150, of the transcript of record in the Alexander appeal.

Refusal to read minutes of the directors meeting held June 18, 1900, at which the roll was called as to those who would "go on," enter into contracts with the General Paper Company, take stock, and continue the business of the General Paper Company.

Alexander's refusal No. 7, ninth and eleventh questions on page 171 of the transcript of record in the Alexander appeal.

Refusal to permit all of the record of the meeting of the stockholders held in December, 1900 (the first annual meeting after the organization of the General Paper Company), to be entered on the record, although the record of said meeting is kept in petitioner's exhibit 29, was initialed by the examiner, and although the witness admitted, when testifying to the list of directors elected at said meeting, that he had skipped two pages of the minutes of said meeting. Witness testified that the pages

skipped relate only to routine business, but did not state what the business was, and counsel for the Government was refused the privilege of inspecting the book to check up the statement of the witness.

Alexander's refusal No. 8, at the bottom of page 183;

Alexander's refusal No. 9, eighth question on page 186;

Alexander's refusal No. 10, second question on page 187;

Alexander's refusal No. 11, following sixth question on page 187;

Alexander's refusal No. 12, seventh question on page 187;

Alexander's refusal No. 13, last question on page 187;

Alexander's refusal No. 14, near the middle of page 189;

Alexander's refusal No. 15, last question on page 189, of the transcript of record in the Alexander appeal.

Refusal to permit the examiner to initial, for identification, pages 42 to 45 of Exhibit 29, being the annual meeting of the stockholders held December 10, 1901. Also, refusal to allow counsel for the Government to inspect said minutes, for the purpose of verifying the statement of the witness as to what they contained. Also, refusal to read the pages of said minutes that were skipped by the witness.

Alexander's refusal No. 16, near the middle of page 199;

Alexander's refusal No. 17, near the top of page 217;

Alexander's refusal No. 18, third question on page 201;

Alexander's refusal No. 19, last question on page 201, of the transcript of record in the Alexander appeal.

Refusal to read the whole of the report of the committee appointed at the meeting held December 10, 1901, to consider and report upon the matter of division of and payment for stock of the General Paper Company. Witness had read a portion of the report, but refused to read the balance.

Alexander's refusal No. 20, fifth question on page 206 of the transcript of record in the Alexander appeal.

Witness had been reading from the record, on the stand, counsel for the defendants had taken the book from the possession of the witness and refused to permit him to read further from it. The witness had been served with a *subpoena duces tecum*, as secretary of the General Paper Company, to produce the book. Witness refused to answer why he permitted the record book to go out of his possession when he was the custodian of it.

Alexander's refusal No. 21, last question on page 206 of the transcript of record in the Alexander appeal.

Under the advice of counsel for the defendants, witness refused to answer to the best of his recollection as to the balance of the report of the committee appointed at the meeting held December 10, 1901, which he had refused to read.

Alexander's refusal No. 22, fifth question on page 211 of the transcript of record in the Alexander appeal.

Witness had stated that he could find nothing further in the record-book concerning the report above adverted to, and counsel for the Government then asked for the privilege of inspecting the record for the purpose of determining the accuracy of the witness' statement. Counsel for the defendants had the book in his possession and refused to allow such inspection.

Alexander's refusal No. 24, request at the bottom of page 213, and first question on page 214;
Alexander's refusal No. 25, second question on page 214, of the transcript of record in the Alexander appeal.

Refusal to inspect exhibit 29 for the purpose of ascertaining whether the minutes of the stockholders' meeting held December 8, 1903, in any way relate to any other corporation defendant making the General Paper Company its sales agent, or making a contract therefor. Counsel for the defendants would not permit the witness to testify, nor permit

the witness to inspect the book.

Alexander's refusal No. 35, last two questions on page 273 of the transcript of record in the Alexander appeal.

Refusal to state whether or not the balance of the record of the meeting of the stockholders held December 8, 1903, not read by the witness, had any relation to the business between the General Paper Company and the other defendant corporations making a contract to make it its exclusive selling agent.

Alexander's refusal No. 38, third question on page 275 of the transcript of record in the Alexander appeal.

Refusal to testify from the record as to the contents of the record of the stockholders meeting held December 13, 1904. Counsel for the defendants had possession of the record-book, stating that he would not permit the witness to regain its possession for the purpose of testifying and that if counsel for the Government wanted the information he would have to get it from him and not from the witness.

Alexander's refusal No. 39, fifth question on page 275 of the transcript of record in the Alexander appeal.

Refusal to give the number and dates of meeting of the directors of the General Paper Company held during the year 1900. Also, refusal to produce

the minutes of the meetings of the board of directors during 1900, although they were offered in evidence by counsel for the Government.

Alexander's refusal No. 40, fifth question on page 288;

Alexander's refusal No. 41, seventh question on page 288;

Alexander's refusal No. 42, last question on page 288;

Alexander's refusal No. 43, first, second, third and fourth questions on page 289 of the transcript of record in the Alexander appeal.

Refusal to state what the records referred to which he refused to produce.

Alexander's refusal No. 44, second question on page 290 of the transcript of record in the Alexander appeal.

Refusal to state whether there was a meeting of the board of directors of the General Paper Company in January, 1902.

Alexander's refusal No. 77, seventh question on page 298 of the transcript of record in the Alexander appeal.

II.

MINUTES OF MEETINGS OF THE EXECUTIVE COMMITTEE.

Counsel for the defendants, on behalf of the witness, refused to produce the minutes of the meeting

of the executive committee of the General Paper Company, and refused to allow the witness to state whether he is the custodian of such records, as secretary of the company, although the witness had previously testified that when he is present he keeps such minutes. Also, refusal to let him state whether he had them in his possession; and when they left his possession.

Alexander's refusal No. 80, last question on page 299;
Alexander's refusal No. 81, first question on page 300;
Alexander's refusal No. 82, third question on page 300;
Alexander's refusal No. 83, fourth question on page 300;
Alexander's refusal No. 84, sixth question on page 300, of the transcript of record in the Alexander appeal.

III.

TREASURER'S REPORTS.

Refusal to state the contents of the treasurer's report, or identify it in any way, or state whether it contained the results of all sales of paper made by the General Paper Company. Also, refusal to state whether the witness, as treasurer of the General

Paper Company, reports the total value of sales each year.

Alexander's refusal No. 36, eighth question on page 274;

Alexander's refusal No. 37, last question on page 274;

Alexander's refusal No. 63, fourth question on page 296, of the transcript of record in the Alexander appeal.

After stating that he had been present when the treasurer's reports to the board of directors were produced, and that he had examined them in a general way to know what they contain, witness refused to state whether they show the profits of the General Paper Company.

Nelson's refusal No. 30, fifth question on page 121 of the transcript of record in the Nelson case.

After stating that he had seen the treasurer's reports, that copies of them had been distributed to him, and that they were distributed every year, witness refused to state whether he had any copies of the reports, or to answer whether or not he would produce them for inspection by counsel for the Government and use in evidence.

McNair's refusal No. 34, sixth question on page 145;

McNair's refusal No. 36, eighth question on page 145; of the transcript of record in the Nelson case.

Refusal to state whether the treasurer's reports show the gross and net earnings of the General Paper Company, or the total sum distributed to the defendant mills by the General Paper Company either as dividends, earnings or surplus of any kind.

McNair's refusal No. 35, seventh question on page 145;

McNair's refusal No. 37, last question on page 145, of the transcript of record in the Nelson case.

IV.

SALES, AND REPORTS OF THE MANAGER OF SALES.

Refusal of witness to state the total sales each year in value of the General Paper Company.

Alexander's refusal No. 61, second question on page 296;

Alexander's refusal No. 62, third question on page 296; of the transcript of record in the Alexander appeal.

Refusal to state whether the General Paper Company has any books showing the total sales.

Alexander's refusal No. 64, fifth question on page 296 of the transcript of record in the Alexander appeal.

Refusal to state whether the said sales amount to ten million dollars annually.

Alexander's refusal No. 65, sixth question on page 296 of the transcript of record in the Alexander appeal.

Refusal to state whether or not his books show that the sales agent made a report to the board of directors or stockholders each year, or that the minutes of the annual meetings show it.

Alexander's refusal No. 70, third question on page 297;

Alexander's refusal No. 71, fifth question on page 297, of the transcript of record in the Alexander appeal.

Refusal to testify as to whether the minutes of the meetings of the board of directors for the years 1900 to 1904 show any record of the reports of the sales agent showing the amount of sales.

Alexander's refusal No. 72, seventh question on page 297;

Alexander's refusal No. 73, eighth question on page 297;

Alexander's refusal No. 74, tenth question on page 297;

Alexander's refusal No. 75, first question on page 298;

Alexander's refusal No. 76, third question on page 298, of the transcript of record in the Alexander appeal.

Refusal to testify as to the quantity or value of paper sold by the General Paper Company, manufactured under contracts with the various mills, in evidence, it being conceded that the witness was the

sales manager of the General Paper Company during the period embraced in the questions.

Stuart's refusal No. 1, last question on page 361;

Stuart's refusal No. 2, first question on page 362;

Stuart's refusal No. 3, second question on page 362;

Stuart's refusal No. 4, fourth question on page 362;

Stuart's refusal No. 5, fifth question on page 362;

Stuart's refusal No. 6, sixth question on page 362;

Stuart's refusal No. 7, seventh question on page 362;

Stuart's refusal No. 8, eighth question on page 362;

Stuart's refusal No. 9, first question on page 363, of the transcript of record in the Alexander appeal.

Refusal to testify as to whether the report of the sales agent shows the prices which the General Paper Company paid to the mills for paper sold.

Nelson's refusal No. 28, sixth question on page 119;

McNair's refusal No. 33, second question on page 145, of the transcript of record in the Nelson case.

Refusal to state whether the reports of the sales agent show the basis of equalization of prices between the defendant companies.

Nelson's refusal No. 29, first question on page 121 of the transcript of record in the Nelson case.

Refusal to state whether the witness was ever present when the report of the sales agent was produced.

McNair's refusal No. 32, sixth question on page 144 of the transcript of record in the Nelson case.

V.

CONTRACTS WITH PUBLISHERS.

Refusal to answer whether the contracts with publishers are usually on a printed blank.

Alexander's refusal No. 57, first question on page 295 of the transcript of record in the Alexander appeal.

Refusal to produce the contracts with the various publishers for the sale of news print paper.

Alexander's refusal No. 58, page 294 of the transcript of record in the Alexander appeal.

Refusal to state where the form of contracts used between the General Paper Company and publishers was procured, or whether same was procured from the International Paper Company.

Alexander's refusal No. 59, fifth question on page 295 of the transcript of record in the Alexander appeal.

VI.

BUTCHER'S FIBER.

Refusals to testify concerning a pool in butcher's fiber.

Alexander's refusal No. 45, tenth question on page 290;

Alexander's refusal No. 46, twelfth question on page 290;

Alexander's refusal No. 47; first question on page 291;

Alexander's refusal No. 48, tenth question on page 291;

Alexander's refusal No. 49, twelfth question on page 291;

Alexander's refusal No. 50, first question on page 292;

Alexander's refusal No. 51, second question on page 292;

Alexander's refusal No. 52, fourth question on page 292;

Alexander's refusal No. 53, sixth question on page 292;

Alexander's refusal No. 54, eighth question on page 292;

Alexander's refusal No. 55, last question on page 292;

Alexander's refusal No. 56, fourth question on page 293, of the transcript of record in the Alexander apeal.

Refusal to answer as to whether he ever knew of a pool in butcher's fiber.

Whiting's refusal No. 16, last question on page 333;

Whiting's refusal No. 17, eighth question on page 334;

Whiting's refusal No. 18, ninth question on page 334, of the transcript of record in the Alexander appeal.

Refusal to state whether the witness ever heard of E. A. Edmonds' acting as a clearing agent, or pool agent, to equalize the prices of butcher's fibre among the defendant mills; or whether he has ever known of Mr. Edmonds' performing any other function or duty in connection with the business of the General Paper Company than that of director and member of the executive committee.

Nelson's refusal No. 1, eleventh question on page 114;

Nelson's refusal No. 2, last question on page 114;

McNair's refusal No. 2, fourteenth question on page 138;

McNair's refusal No. 3, fifteenth question on page 138 of the transcript of record in the Nelson case.

Refusal to state whether the witness knows whether the prices received by the mills have been equalized, as to butcher's fiber;

Or to state whether there has been in existence, during the time the General Paper Company has been the exclusive selling agent of these mills, an arrangement whereby the prices received by the de-

fendant mills for butcher's fiber have been equalized as between the mills.

Nelson's refusal No. 3, second question on page 115;

Nelson's refusal No. 4, fourth question on page 115;

McNair's refusal No. 9, fifth question on page 139, of the transcript of record in the Nelson case.

Refusal to state whether the executive committee fixed the price to be received by all the defendant companies manufacturing butcher's fiber;

Or whether the witness discussed the subject of equalizing the prices on butcher's fiber, at any of the meetings he attended.

McNair's refusal No. 7, third question on page 139;

McNair's refusal No. 8, fourth question on page 139, of the transcript of record in the Nelson case.

Refusal to state whether any of the defendant companies not manufacturing butcher's fiber, have compensated, through the General Paper Company, those mills manufacturing butcher's fiber for making that class of paper because it was less profitable to manufacture than other classes of paper;

Or whether the witness knew if any of the defendant companies manufacturing butcher's fiber have been so compensated;

Or whether his company ever made any payments to any of the mills making butcher's fiber, or

made any payments through the General Paper Company to any of the mills making butcher's fiber since the General Paper Company has been the exclusive selling agent of his company;

Or whether the witness' company made any payments, directly or indirectly, to E. A. Edmonds, as pool agent, to be divided up among the mills making butcher's fiber;

Or whether his company received any statements, through any officer or agent of the General Paper Company, showing or purporting to show the amount to be paid by the witness' company to compensate other defendant companies for making butcher's fiber.

Nelson's refusal No. 5, sixth question on page 115;

Nelson's refusal No. 6, seventh question on page 115;

Nelson's refusal No. 7, last question on page 115;

Nelson's refusal No. 8, first question on page 116;

McNair's refusal No. 4, last question on page 138;

McNair's refusal No. 5, first question on page 139;

McNair's refusal No. 6, second question on page 139, of the transcript of record in the Nelson case.

VII.

DIVIDENDS, COMMISSIONS, EXPENSES AND PROFITS.

Refusal to testify as to the dividends that have been paid by the General Paper Company.

Alexander's refusal No. 66, eighth question on page 296;

Alexander's refusal No. 67, tenth question on page 296, of the transcript of record in the Alexander appeal.

Refusal to testify as to whether it is his duty to pay the dividends that may be declared by the General Paper Company.

Alexander's refusal No. 68, twelfth question on page 296 of the transcript of record in the Alexander appeal.

Refusal to testify as to whether his books show the dividends paid by the General Paper Company.

Alexander's refusal No. 69, first question on page 297 of the transcript of record in the Alexander appeal.

Refusal to state whether he knows the amount of dividends paid by the General Paper Company, or to state what such dividends were.

Stuart's refusal No. 10, second question on page 363;

Stuart's refusal No. 11, third question on page 363, of the transcript of record in the Alexander appeal.

Refusal to state whether he knows the gross amount of commissions received by the General Paper Company. Also, refusal to state what such commissions amounted to, and whether his books show what such commissions were, together with the expenses of conducting the business and the net profits.

Stuart's refusal No. 12, fourth question on page 363;

Stuart's refusal No. 13, fifth question on page 363;

Stuart's refusal No. 14, sixth question on page 363;

Stuart's refusal No. 15, seventh question on page 363, of the transcript of record in the Alexander appeal.

Refusal to state what dividends, if any, the witness or his company has received on his or its stock of the General Paper Company;

Or whether the witness or his company has ever received any dividends on said stock.

Nelson's refusal No. 26, second question on page 119;

Nelson's refusal No. 27, fourth question on page 119;

Bossard's refusal No. 13, first question on page 132;

Bossard's refusal No. 14, third question on page 132;

McNair's refusal No. 28, first question on page 144;

McNair's refusal No. 29, second question on page 144, of the transcript of record in the Nelson case.

VIII.

MANUFACTURERS PAPER COMPANY.

Refusal to testify as to whether, at a meeting with J. C. Brocklebank in Chicago, the proposition was discussed of making the Manufacturers Paper Company the sales agent for all or a portion of the defendants.

Alexander's refusal No. 29, eleventh question on page 247;

Alexander's refusal No. 30, thirteenth question on page 247;

Alexander's refusal No. 31, last question on page 247;

Alexander's refusal No. 32, second question on page 248;

Alexander's refusal No. 33, fourth question on page 248, of the transcript of record in the Alexander appeal.

Refusal to answer whether he attended a meeting in Chicago, in March, 1900, at which plans were discussed for procuring the Manufacturers Paper Company to act as exclusive sales agent for these

defendants or some of them, and at which plans were afterwards discussed of organizing the General Paper Company.

Alexander's refusal No. 34,, first question on page 249 of the transcript of record in the Alexander appeal.

Refusal to state whether the records of the General Paper Company show that at any meeting of the board of directors held in January, 1902, or at any time, the question was discussed of making any arrangement with the Manufacturers Paper Company.

Alexander's refusal No. 78, ninth question on page 298;

Alexander's refusal No. 79, last question on page 298; of the transcript of record in the Alexander appeal.

Refusal to state whether he was present at any meeting in Chicago when the subject was discussed of making the Manufacturers Paper Company the selling agent of these defendants or any of them.

Whiting's refusal No. 1, tenth question on page 307 of the transcript of record in the Alexander appeal.

Refusal to state whether he has ever had any business with Mr. J. C. Brocklebank.

Whiting's refusal No. 2, ninth question on page 308 of the transcript of record in the Alexander appeal.

IX.

INTERNATIONAL PAPER COMPANY.

Refusal to state whether, after the organization of the General Paper Company, he had any conversation with any officer of the International Paper Company about keeping out of the territory west of Chicago.

Whiting's refusal No. 26, third question on page 345 of the transcript of record in the Alexander appeal.

X.

INTERVIEW WITH REPORTER OF PAPER TRADE JOURNAL.

Refusal to state whether he gave out a statement to a reporter of the "Paper Trade Journal," at Appleton, Wisconsin, on June 18, 1900, either during or after the meeting of the board of directors of the General Paper Company.

Alexander's refusal No. 26, last question on page 236;

Alexander's refusal No. 27, fourth question on page 237;

Alexander's refusal No. 28, second question on page 238, of the transcript of record in the Alexander appeal.

XI.

PRELIMINARY AGREEMENTS AND UNDERSTANDINGS.

Refusal to state whether an agreement was arrived at for the organization of a selling company before the completion of the organization of the General Paper Company.

Whiting's refusal No. 3, second question on page 310 of the transcript of record in the Alexander appeal.

Refusal to state whether he had any idea, prior to May 26, 1900, as to what proportion of the stock of the General Paper Company his company would receive. Also, refusal to state whether, prior to the time he subscribed to the stock for his mill, he had any understanding with the other gentlemen who went into this organization as to the amount of stock each would receive.

Whiting's refusal No. 4, last question on page 315;

Whiting's refusal No. 5, sixth question on page 316, of the transcript of record in the Alexander appeal.

Refusal to state whether or not he knew the plan on which the General Paper Company was organized, or the basis of division of the stock.

Whiting's refusal No. 21, tenth and eleventh questions on page 336;

Whiting's refusal No. 22, thirteenth question on page 336, of the transcript of record in the Alexander appeal.

Refusal to state whether he has any recollection of any meeting prior to May 26, 1900, at which a form of contract was agreed upon or adopted.

Whiting's refusal No. 23, first question on page 337;

Whiting's refusal No. 24, second question on page 337;

Whiting's refusal No. 25, sixth question on page 337; of the transcript of record in the Alexander appeal.

Refusal to state whether or not, during a talk between the different manufacturers of paper in Minnesota and Wisconsin, in the winter of 1900, the question was discussed of organizing a corporation for the purpose, among other things, of eliminating competition between the mills;

Or whether he had any talk with any of the gentlemen who represent these defendant mills, in the spring of 1900, about organizing a corporation to act as the general selling agent, in order to eliminate competition.

Nelson's refusal No. 34, sixth question on page 123;

Nelson's refusal No. 35, last question on page 123, of the transcript of record in the Nelson case.

XII.

NEGOTIATIONS BETWEEN OFFICERS OF THE GENERAL PAPER COMPANY AND BOSSARD AND McNAIR.

Refusal to state whether he ever had any talk with A. C. Bossard, of the Itasca Paper Company, with reference to making the General Paper Company the selling agent of his company.

Whiting's refusal No. 6, second question on page 327;

Whiting's refusal No. 7, fourth question on page 327, of the transcript of record in the Alexander appeal.

Refusal to state whether C. I. McNair, representing the Northwest Paper Company, refused to go into the General Paper Company when he saw him at Appleton.

Whiting's refusal No. 8, eighth question on page 328 of the transcript of record in the Alexander appeal.

Refusal to state the conversation he had with

Mr. McNair in Chicago, either at the office of the General Paper Company or at some hotel, about joining the General Paper Company.

Whiting's refusal No. 9, sixth question on page 329;

Whiting's refusal No. 10, last question on page 329, of the transcript of record in the Alexander appeal.

Refusal to state how he knew that Mr. McNair had concluded to go into the General Paper Company.

Whiting's refusal No. 11, fourth question on page 330 of the transcript of record in the Alexander appeal.

Refusal to state whether he had any conversation with Mr. McNair about joining the General Paper Company.

Whiting's refusal No. 12, thirteenth question on page 330;

Whiting's refusal No. 13, fourteenth question on page 330;

Whiting's refusal No. 14, last question on page 330;

Whiting's refusal No. 15, first question on page 331, of the transcript of record in the Alexander appeal.

Refusal to state whether or not, during the spring of 1900, George A. Whiting had several times asked the witness to have his company join the combination and make the General Paper Company

its exclusive selling agent, and that he had declined to do so until the spring of 1902.

McNair's refusal No. 38, eighth question on page 149;

McNair's refusal No. 39, last question on page 149;

McNair's refusal No. 40, second question on page 150 of the transcript of record in the Nelson case.

Refusal to state whether or not any threats were made against the witness or his company, to induce him or it to make the General Paper Company its exclusive selling agent;

Or to state whether officers of the General Paper Company, in the spring of 1902, had threatened to undersell him and ruin the business of his company, if he didn't make the General Paper Company the exclusive selilng agent of his company;

Or to state whether or not they undertook to underbid the witness and run him out of St. Paul and Minneapolis contracts, in 1901.

McNair's refusal No. 41, third question on page 150;

McNair's refusal No. 42, fourth question on page 150;

McNair's refusal No. 43, fifth question on page 150 of the transcript of record in the Nelson case.

Refusal to state whether the witness exacted any promise from the officers of the General Paper Company, at the time that company was made the exclu-

sive selling agent of his company, to protect his customers against exorbitant prices.

McNair's refusal No. 44, sixth question on page 150 of the transcript of record in the Nelson case.

Refusal to state whether he had any agreement or understanding with the officers of the General Paper Company, prior to the time the witness' company made the General Paper Company its exclusive selling agent, that they would keep out of Duluth and not bid for the contracts of the Tribune and Herald.

McNair's refusal No. 45, last question on page 150 of the transcript of record in the Nelson case.

Refusal to state whether he had any conversations with Conde Hamlin of the St. Paul Pioneer Press, A. C. Weiss, of the Duluth Herald, and Milie Bunnell, of the Duluth News-Tribune, or either of them, during the years 1900, 1901 and 1902 (before making the General Paper Company the exclusive selling agent of his company) about going into the combination;

Or whether, at about the time he was negotiating with the General Paper Company to make it the exclusive selling agent of his company, he had a conversation with either Mr. Hamlin, Mr. Weiss or Mr. Bunnell on that subject;

Or whether he had a conversation with Mr. Bun-

nell immediately after he had made the contract with the General Paper Company.

McNair's refusal No. 46, fourth question on page 151;

McNair's refusal No. 47, fifth question on page 151:

McNair's refusal No. 48, sixth question on page 151 of the transcript of record in the Nelson case.

Refusal to state whether the officers of the General Paper Company brought pressure to bear upon his company to go into the combination in 1901, or to keep the prices up, if his company stayed out.

McNair's refusal No. 49, seventh question on page 151 of the transcript of record in the Nelson case.

XIII.

PETOSKEY FIBRE PAPER COMPANY.

Refusal to state whether he heard a discussion as to the Petoskey Fibre Paper Company renewing its contract with the General Paper Company.

Whiting's refusal No. 19, fifth question on page 335 of the transcript of record in the Alexander appeal.

Refusal to state whether there was a discussion at a meeting of the stockholders held December 13, 1904, regarding the dropping of Mr. Cheeseman

from the board of directors of the General Paper Company because the Petoskey Fibre Paper Company had refused to renew its contract with the General Paper Company.

Whiting's refusal No. 20, seventh question on page 335 of the transcript of record in the Alexander appeal.

XIV.

PRODUCT OF MILLS.

Refusal of witness to state what the principal products of the defendant mills are, whether news print or other classes of paper.

Alexander's refusal No. 60, last question on page 295 of the transcript of record in the Alexander appeal.

XV.

PRICES, AND EQUALIZATION THEREOF.

Refusal to answer as to whether the General Paper Company keeps books showing the prices at which paper was sold by the General Paper Company, and the prices received by each of the other

defendant companies for the paper manufactured by them and sold to or through the General Paper Company.

Stuart's refusal No. 16, last question on page 363 of the transcript of record in the Alexander appeal.

Refusal to state what basis of price the General Paper Company makes to his company for the product of its mill.

Bossard's refusal No. 1, tenth question on page 129 of the transcript of record in the Nelson case.

Refusal to state what basis, if any, has been used for the sale of the product of his mill.

McNair's refusal No. 10, second question on page 140 of the transcript of record in the Nelson case.

Refusal to state whether the board of directors, the executive committee, or the stockholders, have, at any time the witnesses have been directors of the General Paper Company, or during any meeting at which the witnesses respectively were present, fixed the price of any grade of paper to be paid by the General Paper Company to the defendant company manufacturing such paper.

Nelson's refusal No. 31, seventh question on page 121;

Bossard's refusal No. 8, third question on page 131;

Bossard's refusal No. 9, fifth question on page 131;

McNair's refusal No. 18, seventh question on page 141 of the transcript of record in the Nelson case.

Refusal to state whether the board of directors, the executive committee, or the stockholders, have, at any time since the organization of the General Paper Company, fixed the price or prices at which the General Paper Company should sell any grade of paper, in any community, or fix a minimum price.

Nelson's refusal No. 32, last question on page 121;

Bossard's refusal No. 10, sixth question on page 131;

McNair's refusal No. 19, eighth question on page 141 of the transcript of record in the Nelson case.

Refusal to state whether he discussed those prices, or fixed any price of paper to be sold for the defendant companies by the General Paper Company, as director, stockholder, or member of the executive committee.

Nelson's refusal No. 33, first question on page 122 of the transcript of record in the Nelson case.

Refusal to state whether, in lieu of dividends, all sums over and above a fixed price were not distributed by the General Paper Company among the defendant manufacturing companies, after deducting the expenses of management of the General Paper Company.

Bossard's refusal No. 15, fourth question on page 132 of the transcript of record in the Nelson case.

Hanging Paper.

Refusals to answer questions in any manner bearing upon an arrangement or understanding between the General Paper Company and the Grand Rapids Pulp & Paper Company, whereby the latter company received or was credited with a fixed price for hanging paper, and subsequently received additional credit for its proportion of the amount over and above that fixed price which the General Paper Company might receive for hanging paper;

Or, whether the books of the Grand Rapids Pulp & Paper Company show that the hanging paper manufactured by it was sold to or through the General Paper Company, and upon what basis;

Or, whether there was any arrangement or understanding among the mills manufacturing hanging paper, or among those mills and the General Paper Company, whereby the prices each mill should receive for hanging paper were equalized.

Same, as to each of the above questions, with respect to news print paper.

(The following page references are to the transcript of record in the Harmon appeal.)

Harmon's refusal No. 1, sixth question on page 150;

Harmon's refusal No. 2, second question on page 152;

Harmon's refusal No. 3, fourth question on page 152;

Harmon's refusal No. 4, sixth question on page 152;

Harmon's refusal No. 5, seventh question on page 152;

Harmon's refusal No. 6, last question on page 152;

Harmon's refusal No. 7, second question on page 153;

Harmon's refusal No. 8, third question on page 153;

Harmon's refusal No. 9, fourth question on page 153;

Harmon's refusal No. 10, fifth question on page 153;

Harmon's refusal No. 11, sixth question on page 153;

Harmon's refusal No. 12, seventh question on page 153;

Harmon's refusal No. 13, last question on page 153;

Harmon's refusal No. 14, first question on page 154;

Harmon's refusal No. 15, second question on page 154;

Harmon's refusal No. 16, ninth question on page 155;

Harmon's refusal No. 17, tenth question on page 155;

Harmon's refusal No. 18, eleventh question on page 155;

Harmon's refusal No. 19, last question on page 155;

Harmon's refusal No. 20, first question on page 156;

Harmon's refusal No. 21, second question on page 156;

Harmon's refusal No. 22, third question on page 156;

Harmon's refusal No. 23, fourth question on page 156;

Harmon's refusal No. 24, fifth question on page 156;

Harmon's refusal No. 25, sixth question on page 156;

Harmon's refusal No. 26; seventh question on page 156;

Harmon's refusal No. 27, eighth question on page 156;

Harmon's refusal No. 28, fifteenth question on page 157;

Harmon's refusal No. 29, sixteenth question on page 157.

Refusal to state whether the defendant corporations manufacturing hanging paper have any arrangement among themselves or with the General Paper Company, whereby the price is equalized which they receive from the General Paper Company for hanging paper.

Nelson's refusal No. 9, second question on page 116 of the transcript of record in the Nelson case.

Refusals to state whether the defendant corporations manufacturing hanging paper had any arrangement, during the years 1900 to 1905, inclusive, whereby the General Paper Company credited each mill with a fixed price for hanging paper, and

the balance received over and above that fixed price was distributed to the defendant companies manufacturing hanging paper on the basis of their output thereof.

Nelson's refusal No. 10, fourth question on page 116;

McNair's refusal No. 16, first question on page 141 of the transcript of record in the Nelson case.

Refusals to state whether such an arrangement has ever existed or been carried out among any of the defendant companies manufacturing hanging paper, during any of those years.

Nelson's refusal No. 13, last question on page 116;

Nelson's refusal No. 16, fifth question on page 117;

McNair's refusal No. 17, sixth question on page 141, of the transcript of record in the Nelson case.

Refusal to state, if he knew, the basis on which the prices to the defendant companies, or any of them, were equalized, for hanging paper sold through the General Paper Company.

Nelson's refusal No. 11, fifth question on page 116 of the transcript of record in the Nelson case.

Refusal to state whether said prices were in any way equalized.

Nelson's refusal No. 12, sixth question on page 116 of the transcript of record in the Nelson case.

Refusal to state whether he ever attended a meeting of the executive committee, where the above

plan of equalization was discussed, during the years 1900 to 1905, inclusive.

Nelson's refusal No. 14, first question on page 117;

Nelson's refusal No. 16, fifth question on page 117 of the transcript of record in the Nelson case.

Refusal to state whether, at any of those meetings, the price was fixed, for any definite period, to be received by the mills for hanging paper, during the years 1900 to 1905, inclusive.

Nelson's refusal No. 15, second question on page 117;

Nelson's refusal No. 16, fifth question on page 117, of the transcript of record in the Nelson case.

News Print Paper.

Refusal to state if he knows how the prices are fixed to the defendant mills for news print paper.

Nelson's refusal No. 17, sixth question on page 117 of the transcript of record in the Nelson case.

Refusals to state whether there was any arrangement between the General Paper Company and any of the defendant mills, whereby news print paper was sold to or by the General Paper Company for a fixed price, during the period which that company has been the general selling agent.

Nelson's refusal No. 18, last question on page 117;

Bossard's refusal No. 4, fourth question on page 130 of the transcript of record in the Nelson case.

Refusal to state, if he knew, whether that price was less than the final price settled for by the General Paper Company with the defendant mills.

Nelson's refusal No. 19, first question on page 118 of the transcript of record in the Nelson case.

Refusal to state whether the balance over and above that fixed price was divided among the defendant mills.

Nelson's refusal No. 20, second question on page 118 of the transcript of record in the Nelson case.

Refusals to state whether the defendant corporations manufacturing news print paper, or any grade of paper, have had any arrangement, among themselves or with the General Paper Company during any of the time since the organization of the General Paper Company, whereby the latter allowed each mill a fixed price for such paper, and the balance received over and above that fixed price for such paper was distributed among the defendants manufacturing such paper on the basis of their output thereof.

Nelson's refusal No. 21, third question on page 118;

Nelson's refusal No. 22, fourth question on page 118;

Bossard's refusal No. 2, first question on page 130;

McNair's refusal No. 15, last question on page 140 of the transcript of record in the Nelson case.

Refusals to state whether any such arrangement as the foregoing has ever existed or been carried out, as to news print paper, among these defendants.

Bossard's refusal No. 6, last question on page 130;

McNair's refusal No. 20, last question on page 141, of the transcript of record in the Nelson case.

Refusal to state whether his company had any arrangement with the General Paper Company and the other defendant companies, for fixing the price of news print paper.

Bossard's refusal No. 3, second question on page 130 of the transcript of record in the Nelson case.

Refusals to state whether there was any arrangement whereby the General Paper Company, as general sales agent, equalized or approximately equalized the prices received by the defendant mills for news print paper, during the time the General Paper Company has been the exclusive selling agent of the respective defendant mills.

Nelson's refusal No. 23, fifth question on page 118;

Bossard's refusal No. 5, seventh question on page 130;

Bossard's refusal No. 7, second question on page 131;

McNair's refusal No. 11, third question on page 140;

McNair's refusal No. 12, fourth question on

page 140, of the transcript of record in the Nelson case.

After stating that the General Paper Company, in accordance with the contracts in evidence, deducted its commission of three per cent from sales made for the respective manufacturing corporations defendant, the witnesses refused to state whether the General Paper Company deducted any more than that amount.

Nelson's refusal No. 24, last question on page 118

Nelson's refusal No. 25, first question on page 119;

Bossard's refusal No. 11, eighth question on page 131;

Bossard's refusal No. 12, last question on page 131;

McNair's refusal No. 30, fourth question on page 144, of the transcript of record in the Nelson case.

Refusal to state whether any sum beyond three per cent, deducted by the General Paper Company as above, has been distributed among the defendant mills.

McNair's refusal No. 31, fifth question on page 144 of the transcript of record in the Nelson case.

XVI.

BOOKS OF CONSTITUENT COMPANIES.

Refusals to state whether the books of their respective companies show the amount and kinds or grades of paper manufactured.

Nelson's refusal No. 36, first question on page 125;

Bossard's refusal No. 16, tenth question on page 132;

Bossard's refusal No. 17, last question on page 132;

McNair's refusal No. 1, fourth question on page 138, of the transcript of record in the Nelson case.

Refusals to state whether said books show the kinds or grades of paper manufactured, respectively, and sold through the General Paper Company, during the time the General Paper Company has been the exclusive selling agent for the respective companies.

Nelson's refusal No. 37, second question on page 125;

Bossard's refusal No. 18, first question on page 133;

McNair's refusal No. 21, fifth question on page 142 of the transcript of record in the Nelson case.

Refusals to state whether said books show where said paper has been sold and shipped.

Nelson's refusal No. 38, third question on page 125;

Nelson's refusal No. 43, first question on page 126;

Bossad's refusal No. 18, first question on page 133;

McNair's refusal No. 22, last question on page 142, of the transcript of record in the Nelson case.

Refusals to state whether said books show the prices received by the respective companies for the paper manufactured by them and sold by the General Paper Company or the net amount received therefor.

Nelson's refusal No. 41, sixth question on page 125;

Bossard's refusal No. 19, second question on page 133;

Bossard's refusal No. 22, sixth question on page 133;

McNair's refusal No. 23, first question on page 143 of the transcript of record in the Nelson case.

Refusals to state whether said books show the prices or amounts received for such paper from the General Paper Company, including entries showing the manner in which the amounts received have been equalized among the defendants manufacturing similar grades of paper, during the time the General Paper Company has been the exclusive selling agent for the respective mills.

Nelson's refusal No. 39, fourth question on page 125;

Bossard's refusal No. 20, fourth question on page 133;

Bossard's refusal No. 21, fifth question on page 133;

McNair's refusal No. 24, second question on page 143 of the transcript of record in the Nelson case.

Refusals to state whether said books show the amounts or proportions of the earnings or profits of the General Paper Company received directly or indirectly by the defendant mills respectively, either in the form of dividends, rebates or otherwise, during the time the General Paper Company has been such exclusive selling agent.

Nelson's refusal No. 40, fifth question on page 125;

Bossard's refusal No. 23, seventh question on page 133;

McNair's refusal No. 25, third question on page 143 of the transcript of record in the Nelson case.

Refusals to state whether said books show any agreement or arrangement under which the prices realized by the respective defendant mills, for various grades of paper, have been equalized, and the profits arising from the sale of such paper distributed or apportioned among the defendants manufacturing such paper, during the time the General Paper Company has been such exclusive selling agent.

Nelson's refusal No. 44, eighth question on page 126;

Bossard's refusal No. 24, last question on page 133;

McNair's refusal No. 26, last question on page 143 of the transcript of record in the Nelson case.

Refusals to produce the books of their respective companies, for inspection by counsel for the Government and use in evidence.

Nelson's refusal No. 45, last question on page 126;

Bossard's refusal No. 25, eighth question on page 134.

McNair's refusal No. 27, top of page 144 of the transcript of record in the Nelson case.

XVII.

ORDERS SECURED BY THE GENERAL PAPER COMPANY FOR THE GRAND RAPIDS PULP & PAPER COMPANY, AND WRITTEN ACCEPTANCES THEREOF.

Refusal to produce, for the purposes of inspection and use in evidence, the orders secured by the General Paper Company for the Grand Rapids Pulp & Paper Company, and the written acceptances

thereof by the Grand Rapids Company.

Harmon's refusal No. 30, fourth and fifth questions on page 158 of the transcript of record in the Harmon appeal.

XVIII.

DISTRIBUTION OF CONTRACTS.

Refusals to state what has been the basis of distribution or apportionment among the defendant manufacturing companies of contracts made by the General Paper Company with publishers or for the sale of news print paper.

McNair's refusal No. 13, fifth question on page 140;

McNair's refusal No. 14, sixth question on page 140 of the transcript of record in the Nelson case.

XIX.

EXCUSES FOR REFUSING TO ANSWER.

Refusal to state whether he refuses to answer on the ground that the testimony will tend to incriminate him.

Alexander's refusal No. 23, last question on page 211 of the transcript of record in the Alexander appeal.

Refusal to state whether he had given all the excuses he desired to give for not answering.

Harmon's refusal No. 31, last question on page 158 of the transcript of record in the Harmon appeal.